

17103

ORDINANCE IMPOSING
HOTEL OCCUPANCY TAX

The undersigned, Members of the County Council of Berkeley County, West Virginia, pursuant to the provisions of § 7-18-1 et seq., of the West Virginia Code, as amended, for the purposes of imposing a local hotel occupancy tax in conformity with state law, do hereby adopt the following Ordinance for the purposes and in the manner hereinafter set forth.

ARTICLE I – DEFINITIONS

For the purposes of this Ordinance, the term:

(a) “Council”, “County” or “County Council” shall mean the County Council of Berkeley County, West Virginia, acting on behalf of Berkeley County, a political subdivision of the State of West Virginia.

(b) “Consideration paid” or “consideration” means the amount received in money, credits, property or other consideration for or in exchange for the right to occupy a hotel room as herein defined.

(c) “Consumer” means a person who pays the consideration for the use of occupancy of a hotel room. The term “consumer” shall not be construed to mean the government of the United States of America, its agencies or instrumentalities, or the government of the state of West Virginia or political subdivisions thereof.

(d) “Convention and Visitors Bureau” and “Visitors and Convention Bureau” are interchangeable, and either shall mean a non-stock, non-profit corporation with a full-time staff working exclusively to promote tourism and to attract conventions, conferences and,

visitors to the County in which such Convention and Visitors Bureau or Visitors and Convention Bureau is located.

(e) “Convention Center” means a convention facility owned by the state, a county, a municipality or other public entity or instrumentality and shall include all facilities, including armories, commercial, office, community service and parking facilities and publicly owned facilities constructed or used for the accommodation and entertainment of tourists and visitors, constructed in conjunction with the Convention Center and forming reasonable appurtenances thereto.

(f) “Evade” means to willfully and fraudulently commit any act with the intent of depriving the state of payment of any tax which there is a known legal duty to pay.

(g) “Fraud” means any false representation or concealment as to any material fact made by any person with the knowledge that it is not true and correct, with the intention that such representation or concealment be relied upon by the state.

(h) “Hotel” means any facility, building or buildings, publicly or privately owned in which the public may, for a consideration, obtain sleeping accommodations. The term shall include, but not be limited to, boarding houses, hotels, motels, inns, courts, lodges, cabins and tourist houses. The term “hotel” shall include state, county and city parks offering accommodations as herein set forth. The term “hotel” shall not be construed to mean any hospital, sanitarium, extended care facility, nursing home or university or college housing unit or any facility providing fewer than three rooms in private homes, not exceeding a total of ten days in a calendar year, nor any tent, trailer or camper campsites; Provided, that where a university or college housing unit provides sleeping accommodations for the general nonstudent public for a

consideration, the term “hotel” shall, if otherwise applicable, apply to such accommodations for the purposes of this tax.

(i) “Hotel operator” means the person who is proprietor of a hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee, trustee in possession, trustee in bankruptcy, receiver, and executor or person in any other capacity. Where the hotel operator performs his functions through a managing agent of any type or character other than an employee, the managing agent shall and shall, have the same duties and liabilities as his principal. Compliance with the provisions of this Order by either the principal or the managing agent shall, however, be considered to be compliance by both.

(j) “Hotel room” means any room or suite of rooms or other facility affording sleeping accommodations to the general public and situated within a hotel. The term “hotel room” does not include:

(1) A banquet room, meeting room or any other room not primarily used for, or in conjunction with, sleeping accommodations; or

(2) Sleeping accommodations rented on a month-to-month basis or other rental arrangement for thirty days or longer at the inception at a boarding house, condominium, cabin, tourist home, apartment or home.

(3) Sleeping accommodations rented by a hotel operator to those persons directly employed by the hotel operator for the purposes of performing duties in support of the operation of the hotel or related operations.

(k) “Net Proceeds” means the gross amount of tax collected less the amount of tax lawfully refunded.

(l) “Person” means any individual, firm, partnership, joint venture, association, syndicate, social club, fraternal organization, joint stock company, receiver, corporation, guardian, trust, business trust, trustee, committee, estate, executor, administrator, or any other group or combination acting as a unit.

(m) “Promotion of the Arts” means activity to promote public appreciation and interest in one or more of the arts. It includes the promotion of music for all types, the dramatic arts, dancing, painting in the creative arts through shows, exhibits, festivals, concerts, musicals and plays.

(n) “Recreation Facilities” means and includes any public parks, parkway, playground, public recreation center, athletic field, sports arena, stadium, skating rink arena, golf course, tennis courts and other park and recreational facilities, whether of a like or different nature, that are owned by the County.

(o) “Regional Travel Council” means a non-stock, nonprofit corporation, with a full-time staff working exclusively to promote tourism and to attract conventions, conferences and visitors to the region of this State served by the Regional Travel Council.

(p) “Tax”, “taxes” or “this tax” means the hotel occupancy tax authorized by this Ordinance.

(q) “Taxing authority” means the Berkeley County Council levying or imposing the tax authorized by this Ordinance.

(r) "Taxpayer" means any person liable for the tax authorized by this Ordinance.

(s) "Willfully" means the intentional violation of a known legal duty to perform any act, required to be performed by any provision of this Ordinance, in respect of which the violation occurs: Provided, that the mere failure to perform any act shall not be willful violation under this Order. A willful violation of the Order requires that the defendant have had knowledge of or notice of a duty to perform such act, and that the defendant, with knowledge of or notice of such duty, intentionally failed to perform such act.

ARTICLE II - IMPOSITION AND LEVY OF TAX;

RATE OF TAX; EXCEPTIONS

SECTION ONE. AUTHORITY TO IMPOSE TAX.

On or after June 1, 1987, there is hereby imposed and levied a privilege tax upon the occupancy of hotel rooms located within the County's taxing jurisdiction, in accordance with provisions of Section 1, Article 18, Chapter 7 of the Code of West Virginia, as amended.

SECTION TWO. COUNTY TAX.

Such privilege tax shall be imposed by the taxing authority uniformly throughout the County. The tax shall apply to all hotels located outside of the corporate limits of a

municipality, including hotels owned by the State of West Virginia or any political subdivision of the State of West Virginia.

SECTION THREE. RATE OF TAX, IMPOSITION AND EXCEPTION

The rate of tax imposed shall be six percent (6%) of the consideration paid for the use or occupancy of a hotel room. Such consideration shall not include the amount of tax imposed on the transaction under Article 15, Chapter 11, of the West Virginia Code, as amended or charges for meals, valet service, room service, telephone service or other charges or consideration not paid for use or occupancy of a hotel room.

The tax shall be imposed on the consumer and shall be collected by the hotel operator as part of the consideration paid for the occupancy of a hotel room. Provided, that the tax shall not be applicable to any facility providing fewer than three (3) rooms in private homes, not exceeding a total of ten days in a calendar year.

ARTICLE III

CONSUMER TO PAY TAX; HOTEL OR HOTEL OPERATOR
NOT TO REPRESENT THAT IT WILL ABSORB TAX; ACCOUNTING BY HOTEL

SECTION ONE. CONSUMER TO PAY TAX.

The consumer shall pay to the hotel operator the amount of tax imposed by the County, which tax shall be added to and shall constitute a part of the consideration paid for the use and occupancy of the hotel room, and which tax shall be collectible as such by the hotel operator who shall account for, and remit to the taxing authority, all taxes paid by consumers. The hotel operator shall separately state the tax authorized by this Order on all bills, invoices,

accounts, books of account and records relating to consideration paid for occupancy or use of a hotel room. The hotel operator may co-mingle taxes hereunder with the proceeds of the rental of hotel accommodations. Provided, however, the taxing authority's claim shall be enforceable against, and shall be superior to, all other claims against the monies so co-mingled, excepting only claims of the State for monies held by the hotel pursuant to the provisions of Article 15, chapter 11, of the West Virginia Code, as amended. All taxes collected pursuant to the provisions of this Order shall be deemed to be held in trust by the hotel until the same shall have been remitted to the taxing authority as hereinafter provided.

SECTION TWO. HOTEL OR HOTEL OPERATOR NOT TO REPRESENT THAT IT WILL ABSORB TAX.

The hotel or hotel operator shall not represent to the public, in any manner, directly or indirectly, that it will absorb all or any part of the tax or that the tax is not to be considered an element in the price to be collected from the consumer.

ARTICLE IV

OCCUPANCY BILLED TO GOVERNMENT AGENCIES OR EMPLOYEES

SECTION ONE. FEDERAL GOVERNMENT.

Hotel room occupancy billed directly to the Federal Government shall be exempt from this tax. Provided, however, that rooms paid for by a Federal Government employee for which reimbursement is made shall be subject to this tax.

SECTION TWO. STATE GOVERNMENT.

Hotel room occupancy billed directly to the State of West Virginia or its political subdivisions shall be exempt from this tax. Provided, however, that rooms paid for by an employee of the State of West Virginia or its political subdivisions for which reimbursement is made shall be subject to this tax.

ARTICLE V

COLLECTION OF TAX WHEN
SALE ON CREDIT

A hotel operator doing business wholly or partially on a credit basis shall require the consumer to pay the full amount of tax due upon a credit sale at the time of such sale or within thirty (30) days thereafter.

ARTICLE VI

RECEIVERSHIP BANKRUPTCY;
PRIORITY TAX

In the distribution, voluntary or compulsory, in receivership, bankruptcy or otherwise, of the property or estate of any person, all taxes due and unpaid authorized under this Order shall be paid from the first money available for distribution to all claims and liens except taxes and debts due to the United States, which, under federal law, are given priority over the debts and liens created by Order of the County Commission for this tax and taxes due to the state of West Virginia. Any person charged with the administration or distribution of any such property or estate, who shall violate the provisions of this Section, shall be personally liable for any taxes accrued and unpaid, which are chargeable against the person whose property or estate is in administration or distribution.

ARTICLE VII

FAILURE TO COLLECT OR REMIT TAX;
LIABILITY OF HOTEL OPERATOR

If any hotel operator fails to collect the tax authorized by and levied pursuant to this Ordinance or shall fail to properly remit such tax to the taxing authority, he shall be personally liable for such amount if he failed to collect or remit. Provided, that such hotel operator shall not be held liable for failure to collect such tax if the hotel operator can, by good and substantial evidence, prove the refusal of the purchaser to pay this tax despite the diligent effort and good faith of the hotel operator to collect the tax.

ARTICLE VIII

TOTAL AMOUNT COLLECTED
TO BE REMITTED

No profit shall accrue to any person as a result of the collection of the tax authorized under this Ordinance. Notwithstanding that the total amount of such taxes collected by a hotel operator may be in excess of the amount for which a consumer would be liable by the application of the levy imposed under this Ordinance, the total amount of all taxes collected by any hotel operator shall be remitted to the taxing authority as hereinafter provided.

ARTICLE IX
INTEREST AND PENALTIES

The tax imposed and levied by this Ordinance, if not paid when due, shall bear interest at the rate of six percent (6%) per annum from the due date of the return until paid.

If any hotel operator fails to make the return installment required by this Ordinance, or makes his return, but fails to remit in whole or in part the proper amount of tax, there shall be added to the amount of tax unpaid, from the date such tax should have been

paid, a penalty in the amount of five percent (5%) of the tax for the first month, or fraction thereof, of delinquency and one percent (1%) of the tax for each succeeding month, or fraction thereof, of delinquency; provided, that if such failure is due to reasonable cause, then the taxing authority may waive in whole or in part these penalties.

ARTICLE X
TAX RETURN, PAYMENT, EXCEPTION

SECTION ONE. TAX RETURN AND PAYMENT.

The tax authorized by this Ordinance shall be due and payable in monthly installments on or before the fifteenth (15th) day of the calendar month next succeeding the month in which the tax accrued. Provided, that for credit sales in which the tax authorized by this Ordinance is not collected by the hotel operator at the time of such sales, such tax shall not, for purposes of this Ordinance be regarded as having accrued until the date on which it is either received by the hotel operator, or upon the expiration of the thirty (30) day payment period set forth in Article Five of this Ordinance, whichever shall first occur. The hotel operator shall, on or before the fifteenth (15th) day of each month, prepare and deliver to the taxing authority, a return for the preceding month, in the form prescribed by the taxing authority. A remittance for the amount of the tax due shall accompany each return. Each return shall be signed by the hotel operator or his duly authorized agent.

SECTION TWO. EXCEPTION - SPECIAL RULE.

In the event that the tax due for any reporting period is less than ten dollars (\$10.00) the reporting requirements as stated under Section 10.1 of this order are hereby waived and no reporting shall be required until such time that the tax liability exceeds ten dollars (\$10.00).

ARTICLE XI
KEEPING AND PRESERVING OF RECORDS

Each hotel operator shall keep complete and accurate records of taxable sales and of charges, together with a record of the tax collected thereon, and shall keep all invoices and other pertinent documents in such form as the taxing authority may require. Such records and other documents shall be preserved for a period of not less than three (3) years. Taxing authorities shall have the right to inspect the records of the hotel operator at all reasonable times.

ARTICLE XII
LIABILITY OF OFFICERS

If the taxpayer is an association or corporation, the officers thereof actually participating in the management or operation of the association or corporation shall be personally liable, jointly and severally, for any default on the part of the association or corporation; and payment of tax, fines, additions to tax or penalties which may be imposed by state law, ordinance of the County Council or other authority may be enforced against such officers as against the association or corporation which they represent.

ARTICLE XIII
CESSATION OF BUSINESS

Whenever any operator required to collect and pay the taxing authority any tax collected pursuant to the provisions of this Ordinance shall cease to operate, go out of business or otherwise dispose of his business, any tax then payable to the County shall become immediately due and payable; and such operator shall immediately make a report and pay the tax due the County.

ARTICLE XIV

GENERAL PROCEDURE AND ADMINISTRATION

SECTION ONE. SHERIFF AS AGENT OF COUNTY.

The Sheriff of the County shall be the County's agent for administration and collection of the tax and shall have the power to distrain property and to initiate civil suits for collection of the tax authorized by this Ordinance.

The County Assessor shall have the power and the duty to issue tax returns for this tax.

SECTION TWO. ASSESSMENT OF TAX WHEN INSUFFICIENTLY RETURNED.

If the Sheriff believes that the tax imposed by this Ordinance has been insufficiently returned by an operator, either because the operator has failed or refused to properly collect or remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability of the operator and make an assessment therefore. Assessments shall be served upon the taxpayer, either personally or by certified mail.

SECTION THREE. NOTICE OF ASSESSMENT, PETITION FOR REASSESSMENT.

The Sheriff shall give the operator written notice of any assessment made pursuant to this Ordinance. Unless the operator to whom a notice of assessment is given shall, within thirty (30) days after service thereof, either personally or by certified mail, file with the Sheriff a petition in writing, verified under oath by the operator or his duly authorized agent having knowledge of the fact, setting forth with particularity the items of the assessment objected to, together with the reasons for the objections, the assessment shall become final and not subject to administrative or judicial review. The amount of an assessment shall be due and payable on the day following the date upon which the assessment becomes final.

SECTION FOUR. HEARING PROCEDURE; ADMINISTRATIVE DECISION.

(a) When a petition for reassessment provided for in Section Three is filed within the time prescribed in such Section for such filing, the Sheriff shall assign a time and place of a hearing hereon and shall notify the operator of such hearing by written notice at least twenty (20) days in advance thereof. Such hearing shall be held within one hundred (100) days from the date of filing the petition unless continued by agreement of the parties or by the Sheriff for sufficient cause.

(b) The hearing shall be informal and shall be conducted in an impartial manner by the Sheriff or a hearing examiner designated by the Sheriff. The burden of proof shall be upon the operator to show the assessment is incorrect, and contrary to law, in whole or in part.

(c) After any such hearing, the Sheriff or a hearing examiner shall, within a reasonable time, not to exceed thirty (30) days, give notice in writing of his decision.

SECTION FIVE. APPEALS TO CIRCUIT COURT.

(a) An appeal may be taken by the operator to the Circuit Court of Berkeley County within thirty (30) days after service of the Sheriff's hearing examiner's decision.

(b) The appeal shall be taken by the filing of a petition and notice, which petition and notice shall be served upon or accepted by the Sheriff as an original notice. When the petition and notice are so served they shall, with the return or acceptance thereon, be filed in the office of the Clerk of the Circuit Court and docketed as other cases, with the operator as plaintiff and the Sheriff as defendant. The filing of the appeal shall not stay the collection of the tax. The collection of the tax shall be stayed if the plaintiff shall file with such Clerk a bond for the use of the defendant, with sureties approved by the Clerk, the penalty of the bond to be not less than the total amount of the tax, interest and penalties (to such date) appealed from and conditioned, that the plaintiff shall perform the orders of the Court; provided, that a Judge of the Circuit Court may stay the collection of the tax without the requirement of a bond upon a proper showing by the operator that the properties of the operator are sufficient to secure performance of the Court's orders or that the ends of justice will be served thereby.

(c) The Court shall hear the appeal and determine anew all questions submitted to it on appeal, from the determination of the Sheriff. In such appeal, a certified copy of the Sheriff's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of the order. The Court shall render its decree thereon; and a certified copy of the decree shall be filed by the Clerk of the Court with the Sheriff, who shall then, if applicable, correct the assessment in accordance with such decree.

(d) Unless an appeal is taken pursuant to this Section within thirty (30) days after service of the administrative decision, the Sheriff's decision shall become final and conclusive and not subject to administrative or judicial review. The amount, if any, due the County under such decision shall be due and payable on the day following the date upon which such decision becomes final.

SECTION SIX. TAX CONSTITUTES DEBT DUE COUNTY.

Any tax, penalties or interest due and payable under this Ordinance shall be a debt due the County and shall be recoverable in an action brought in the name of the County for the recovery of such tax, penalty or interest.

SECTION SEVEN. INJUNCTION.

If the failure of any operator to comply with the provisions of this Ordinance shall have continued sixty (60) days, the Sheriff may proceed to obtain an injunction restraining the operator from doing business in this County until he fully complies with the provisions of this Ordinance. In any proceeding under this Section upon judgment or decree for the plaintiff, he shall be awarded his costs.

SECTION EIGHT. RECORDS; LIMITATION ON ASSESSMENTS.

The amount of tax, interest and penalties imposed by this order shall be assessed within two (2) years after the due date of the return; provided, that in the case of a false or fraudulent return filed with the intent to evade the tax or in case no return is filed, the assessment may be made at any time.

SECTION NINE. REFUNDS.

(a) Whenever the amount of any tax, interest or penalty been overpaid or paid more than once or has been erroneously or illegally collected or received by the County under the provisions of this Ordinance, it may be refunded as provided in subsections (b) and (c) of this section, if a claim in writing therefore, stating under penalty of perjury, the specific grounds upon which the claim is founded, is filed with the County within two (2) years of the date of payment of such tax, interest or penalty. Claims for refund shall be made in writing.

(b) An operator may claim a refund or take as a credit against taxes collected and remitted the amount overpaid, paid more than once or erroneously or illegally collected or received when it is established that the person from whom the tax has been collected was not liable for the payment of such tax; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has been refunded to the person from whom the tax was collected.

(c) A person paying the tax may obtain a refund of tax overpaid or paid more than once or erroneously or illegally collected or received by the County by filing a claim for refund, but only when the tax was paid by such person directly to the Sheriff or when such person, having paid the tax to the operator, establishes that such person has been unable to obtain a refund, from the operator who collected the tax.

(d) No refund shall be paid unless the claimant establishes his right thereto by written records evidencing this entitlement thereto.

ARTICLE XV

CRIMINAL PENALTIES

(a) It shall be unlawful for any person to willfully refuse to collect or to pay the tax or to willfully refuse to make the return required to be made by this Ordinance; or to willfully make any false or fraudulent return or false statement in any return with the intent to defraud any taxing authority, or to willfully evade the payment of the tax, or any part thereof; or for any person to willfully aid or abet another in any attempt to evade the payment of the tax, or any part thereof; or for any officer, partner or principal of any corporation or association to willfully make or willfully permit to be made for such corporation or association any false return, or any false statement in any return authorized by this Ordinance, with the intent to evade the payment of tax, or any part thereof; or for any person to willfully aid or abet evasion of this tax.

(b) Any person willfully violating any of the provisions of this Order shall for the first offense, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than Five Hundred Dollars (\$500.00) or imprisoned by a period of not more than thirty (30) days, or both fined and imprisoned. For each offense after the first offense, such person shall be guilty of a felony, and, upon conviction thereof, shall be fined not less than One Thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or imprisoned in the penitentiary not less than one (1) year, nor more than three (3) years, or in the discretion of the Court, be confined in the County Jail no more than one (1) year, or both fined and imprisoned.

(c) Every prosecution for any offense arising under this Ordinance shall be commenced within three (3) years after the offense was committed, notwithstanding any provision of the Code of West Virginia to the contrary.

(d) Proceedings against any person under this Section shall be initiated in the county of this state wherein such person resides if any element of the offense occurs in such county of residence, or if no element of the offense occurs in such county of residence, then in the county where the offense was committed.

ARTICLE XVI

PROCEEDS OF TAX; APPLICATION OF PROCEEDS

SECTION ONE. APPLICATION OF PROCEEDS.

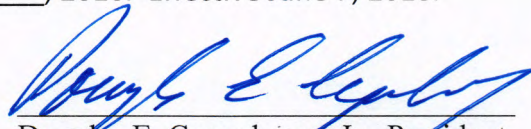
The net proceeds of the tax collected and remitted to the taxing authority pursuant to this Ordinance shall be deposited into the General Revenue Fund of the County Council, and after appropriation thereof, shall be expended only as set forth in Section Two, hereinbelow.

SECTION TWO. ALLOCATION FORMULA.

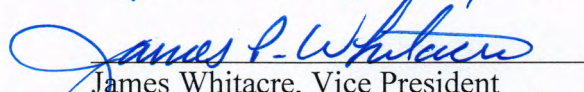
The County Council agrees to establish a Visitors Bureau in conjunction with the City of Martinsburg to promote tourism and conventions within Berkeley County.

Fifty percent (50%) of all proceeds collected under this tax shall be designated to the Convention and Visitors Bureau. The permissible expenditures, or remaining fifty percent (50%), shall be allocated to the permissible activities of the Martinsburg-Berkeley County Recreation Authority.

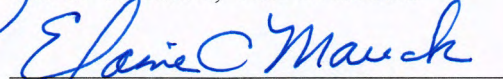
Amended this _____ day of _____, 2016. Effective June 7, 2016.



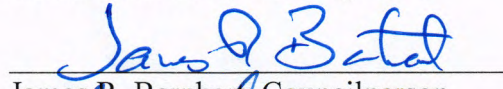
Douglas E. Copenhagen, Jr., President



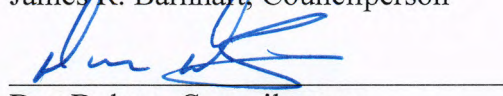
James Whitacre, Vice President



Elaine C. Mauck, Councilperson




James R. Barnhart, Councilperson




Dan Dulyea, Councilperson

John W Small Jr
BERKELEY County 01:20:34 PM
Instrument No 20160017103
Date Recorded 05/05/2016
Document Type ORBNF
Pages Recorded 19
Book-Page 1136-248

ATTEST:



John C. Small, Jr., Clerk

hotelmotel2016amend