



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 2, 2020

The Honorable Laurie K. English
112th Judicial District Attorney
400 South Nelson
Fort Stockton, Texas 79735

Opinion No. KP-0281

Re: Whether a municipality may use tax revenue for a visitor information center owned and operated by a chamber of commerce (RQ-0296-KP)

Dear Ms. English:

You ask about a municipality's use of local hotel occupancy tax revenue for a visitor information center owned and operated by a local chamber of commerce.¹ According to a complaint received by your office, the City of Big Lake (the "City") expended approximately \$65,000 to repair and improve the chamber's offices. Request Letter at 1. The City contends that the chamber of commerce owns and operates the City's visitor information center in addition to its other functions and that state law permits the use of municipal hotel occupancy tax revenue for visitor information centers. *Id.* You believe the law limits authorized expenditures to instances in which the municipality actually owns or leases the visitor center, and additionally that the use of funds for a private organization that promotes "all the private businesses of its members" would violate the statutory requirement that the funds only "promote tourism and the convention and hotel industry." *Id.* at 1–2. Whether the City's expenditure was permissible as a matter of law depends on fact issues this office cannot determine in the opinion process. *See* Tex. Att'y Gen. Op. No. GA-0542 (2007) at 5 ("This office does not find facts or resolve fact questions in the opinion process."). The City's governing body must make the determination regarding the propriety of a hotel occupancy tax expenditure in the first instance, subject to judicial review. *See* Tex. Att'y Gen. Op. No. KP-0131 (2017) at 2. Thus, we advise you only generally.

As a preliminary matter, we address the use of public money for a private organization. Article III, section 52(a) of the Texas Constitution prohibits the Legislature from authorizing a city "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." TEX. CONST. art. III, § 52(a). However, an expenditure of public funds for a legitimate public purpose to obtain a clear public benefit is not a gratuitous grant of public funds. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). The Texas Supreme Court articulated a three-part test to determine whether an expenditure of public funds is constitutional. *See Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp.*

¹*See* Letter from Honorable Laurie K. English, Dist. Att'y, 112th Jud. Dist., to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (July 8, 2019), <http://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

Comm'n, 74 S.W.3d 377, 384 (Tex. 2002). A governmental entity considering a public expenditure must (1) ensure that the expenditure is to “accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Id.* It is for the governing body of the governmental entity to determine whether an expenditure satisfies the three-part test. *See* Tex. Att’y Gen. Op. No. KP-0208 (2018) at 2–3 (“The determination whether a particular expenditure satisfies the three-part test is for the [governmental entity] to make in the first instance, subject to judicial review for abuse of discretion.”).

Turning to your specific questions, the statutory provisions to which you refer come from chapter 351 of the Tax Code, which governs municipal hotel occupancy taxes. *See generally* TEX. TAX CODE §§ 351.001–360. Section 351.002(a) allows a municipality to impose a tax on the use or possession of a hotel room. *See id.* § 351.002(a). Expenditures of revenue from that tax must adhere to certain limitations set forth in chapter 351. First, the municipality may use the revenue only to promote tourism and the convention and hotel industry, and then only as specifically limited by statute. Relevant here, subsection 351.101(a)(1) provides:

(a) Revenue from the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry, and that use is limited to the following:

(1) the acquisition of sites for *and* the construction, improvement, enlarging, equipping, repairing, operation, *and* maintenance of convention center facilities or visitor information centers, or both;

.....

Id. § 351.101(a)(1) (emphasis added). You state your belief that because subsection 351.101(a)(1) begins with the phrase, “the acquisition of sites,” this provision in the context of visitor information centers applies only when the municipality owns or leases the center. *See* Request Letter at 1.

The authorized purpose articulated in subsection 351.101(a)(1) contains a series of actions, beginning with the phrase “the acquisition of sites for,” which are joined in two places by the conjunctive word “and.” *See* TEX. TAX CODE § 351.101(a)(1). Ordinarily, the term “and” is not synonymous with the term “or,” such that a court would construe a list of actions joined by the word “and” to require the fulfillment of every listed action, as opposed to allowing for a selection among various options. *See State v. Gammill*, 442 S.W.3d 538, 541 (Tex. App.—Dallas 2014, pet. ref’d) (stating that “the terms ‘and’ and ‘or’ are not interchangeable in general”). But the terms “may be interpreted as synonymous when necessary to effectuate the legislature’s intent or to prevent ambiguity, absurdity, or mistake.” *Id.* Here, the list of actions in subsection 351.101(a)(1) construed in strict grammatical fashion would compel the acquisition of sites as well as the construction, improvement, enlarging, equipping, repairing, operation, and maintenance of either a convention center facility or a visitor information center, or both, but not the exercise of a singular action, such as a repair on an existing building. The Legislature could not reasonably

have intended this result. Instead, the context requires construing subsection 351.101(a)(1) as listing alternative authorized uses of the tax revenue.

Furthermore, construing subsection 351.101(a)(1) to apply in the context of visitor information centers only when a municipality owns or leases them would add an ownership requirement to the Legislature's definition of "visitor information center" where it does not exist. A visitor information center "means a building or a portion of a building used to distribute or disseminate information to tourists." TEX. TAX CODE § 351.001(8) (defining visitor information center). The definition makes no reference to the center's ownership. In contrast, the Legislature defined "convention center facilities" specifically to include a municipal ownership or management requirement. *See id.* § 351.001(2) (defining convention center facilities as "civic centers, civic center buildings, auditoriums, exhibition halls, and coliseums *that are owned by the municipality . . . or that are managed in whole or part by the municipality*" (emphasis added)). Thus, a court would likely conclude that the term "and" in subsection 351.101(a)(1) is synonymous with "or," such that the authorized purpose can include any action listed therein individually. As such, subsection 351.101(a)(1) does not limit the use of tax proceeds in the context of visitor information centers to only those owned or leased by a municipality.²

Chapter 351 also requires that municipal hotel occupancy tax revenue "be expended in a manner *directly* enhancing and promoting tourism and the convention and hotel industry as permitted by" subsection 351.101(a). *Id.* § 351.101(b) (emphasis added); *see also* Tex. Att'y Gen. Op. No. KP-0131 (2017) at 1–2 (noting that "directly" means "with nothing or no one in between"). Thus, an expenditure of municipal hotel occupancy tax revenue pursuant to subsection 351.101(a) to repair a visitor information center must directly benefit the building or portion of the building used to distribute or disseminate information to tourists in order to satisfy subsection 351.101(b)'s requirement that the expenditure directly enhance and promote tourism and the convention and hotel industry.

²We do not address whether some form of ownership or long-term lease would be required by the municipality for the visitor information center if the municipality sought to issue bonds payable from hotel occupancy taxes to finance the construction of or make capital improvements to the center.

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A court would likely conclude that subsection 351.101(a)(1) of the Tax Code does not limit the use of hotel occupancy tax revenue in the context of visitor information centers to only those owned or leased by a municipality. An expenditure of municipal hotel occupancy tax revenue pursuant to subsection 351.101(a) to repair a visitor information center must directly benefit the building or portion of the building used to distribute or disseminate information to tourists in order to satisfy subsection 351.101(b)'s requirement that the expenditure directly enhance and promote tourism and the convention and hotel industry.

Very truly yours,



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