



## Arts Commission

### Regular Meeting Agenda

City Hall – Briefing Room

203 E. Wheatland Rd., Duncanville, TX 75116

**Tuesday, September 24, 2024**

6:30 PM

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1. Call to Order
2. Receive public comments, limit 2 minutes per individual speaker.

To submit a comment via email and for your comments to be read, the following information is required:

- i. Submit a comment by 4:00 PM on Tuesday, September 24, 2024
- ii. Email [alex.hamby@duncanvilletx.gov](mailto:alex.hamby@duncanvilletx.gov)
- iii. Email Title: Arts Commission Public Comment — September 24th.
- iv. First and last name; and home address.

The staff liaison will set a two-minute time limit on comments as they are read. All comments will be included in the meeting minutes.

3. The Arts Commission to review the new Duncanville Arts Fund Policy, adopted by the Duncanville City Council on Tuesday, September 17, 2024, with the City Attorney
4. The Arts Commission to receive a Boards and Commissions orientation from the City Attorney
5. Discuss Arts Commission Rules and Procedures for future meetings
6. Commissioners Reports (limit to 2 minutes each)
7. National Hispanic Heritage Pop-Up report (requested by Dr. Anne Perry)
8. Film Series discussion (requested by Dr. Anne Perry)
9. Adjournment.

I, the undersigned authority, do hereby certify that this Notice of Meeting was posted in accordance with the regulations of the Texas Open Meetings Act to the digital kiosk located at the entrance to the City of Duncanville, Texas City Hall, a place convenient and readily accessible to the general public, as well as to the City's website [www.DuncanvilleTX.gov](http://www.DuncanvilleTX.gov) and said Notice was posted by Friday, September 20, 2024, at 5:00 PM and remained posted for at least two hours after said meeting was convened.

**Alex Hamby**

Communications and Marketing Administrator

# Arts Funding Policy for the City of Duncanville Using Hotel Occupancy Tax (HOT) Funds

## 1. Establishment of the Duncanville Arts Fund

The City Council of Duncanville has established a dedicated Arts Fund, known as the “Duncanville Arts Fund,” to support and promote the arts within our community. This special revenue fund will be used for the promotion, creation, and installation of art throughout Duncanville, as well as for artisan events held within city limits. Managed by the Duncanville Arts Commission, the fund is designed to support the arts community and grow annually, reflecting the City's commitment to enhancing and expanding its cultural and artistic offerings. The City Council will provide final oversight as needed to ensure the fund's effectiveness and alignment with community goals.

## 2. Purpose of the Arts Fund

The Arts Fund aims to support a broad range of art-related programs and activities that promote tourism and contribute to the hotel and convention industry. This includes funding for instrumental and vocal music, dance, drama, folk art, creative writing, architecture, design, painting, sculpture, photography, graphic and craft arts, motion pictures, radio, television, tape and sound recording, and other arts-related activities.

## 3. Authorization for HOT Funds

The City Council of Duncanville authorizes and directs the City Manager to transfer 15% of the annual HOT funds revenue to the Arts Fund. These funds are designated for expenditures that align with the goals of this policy as established by the City Council.

## 4. Legal Framework and Eligibility

- **HOT Fund Use:** According to [Section 351.101\(a\) of the Texas Tax Code](#), municipal hotel occupancy tax funds may be used exclusively to promote tourism, including the arts and the hotel and convention industry. [Texas Attorney General Opinion GA-0124](#) reinforces this utilization.
- **Restrictions on Facilities:** Based on [Attorney General Opinion KP-0131](#), HOT funds cannot be used solely for the construction of arts facilities. Such expenditures must be combined with other authorized categories of hotel tax expenditures to comply with legal requirements.

## 5. Eligible Expenditures

Art funds may be used for a variety of art-related programs that directly promote tourism and hotel activity, in line with HOT fund requirements. Eligible art forms include, but are not limited to:

- Instrumental and vocal music
- Dance
- Drama
- Folk art
- Creative writing
- Architecture
- Design and allied fields
- Painting
- Sculpture
- Photography
- Graphic and craft arts
- Motion pictures
- Radio, television, tape, and sound recording

## 6. Fund Administration

- **Management:** The Arts Fund will be administered by the Duncanville Arts Commission, which is responsible for overseeing and approving fund allocations.
- **Growth:** The fund is designed to grow annually, aiming to enhance the City's cultural landscape and support tourism.

## 7. Approval Process

- **Expenditures Less Than \$20,000:** Must be approved by the Arts Commission and the Duncanville Community Economic Development Corporation (DCEDC).
- **Expenditures of \$20,000 or More:** All requests for funding of an amount equal to \$20,000 or more must be advanced to City Council for consideration, regardless if the Arts Commission or DCEDC has approved or denied the request.

## 8. Reporting and Accountability

The Arts Commission will provide regular quarterly reports to the City Council detailing the use of the Arts Fund and its impact on tourism and hotel occupancy. An annual review will be conducted to evaluate the effectiveness and alignment with the City's goals.

## 9. Policy Review

The City Council, DCEDC, or Arts Commission may conduct regular reviews to ensure expenditures align with the intended use of HOT funds and fulfill statutory requirements. The impact of funded projects on tourism and hotel activity will be assessed, and any discrepancies between the economic impact and HOT funds spent will be addressed in compliance with state regulations. The City Council reserves the right to make changes to this policy at any time.

Ref. [The Hotel Tax "Two-Step"](#)

# **What Cities Need to Know to Administer Municipal Hotel Occupancy Taxes**

**Abridged Version**

Texas Hotel & Lodging Association

**REVISED 2018**

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## **Editor’s Note**

This is the abridged version of THLA’s *What Cities Need to Know to Administer Municipal Hotel Occupancy Taxes*. A full version of this article, with information including expanded information on hotel tax collection, tax exemptions, and city-specific rules, is available by contacting THLA at 512-474-2996 or emailing us at [news@texaslodging.com](mailto:news@texaslodging.com).

## **Authorized Entities**

All incorporated Texas municipalities, including general law and home rule cities, may enact a hotel occupancy tax within the city limits.<sup>1</sup> A city with a population of under 35,000 may also adopt the hotel occupancy tax within that city’s extraterritorial jurisdiction (ETJ).<sup>2</sup> Most cities are eligible to adopt a hotel occupancy tax at a rate of up to 7 percent of the price paid for the use of a hotel room.<sup>3</sup> Additionally, a city or county may not propose a hotel occupancy tax rate that would result in a combined hotel occupancy tax rate imposed from all sources that would exceed 17 percent of the price paid for the room.<sup>4</sup> If a city adopts the hotel occupancy tax within its ETJ, the combined state, county, and municipal hotel occupancy tax rate may not exceed 15 percent.<sup>5</sup> Texas has among the highest combined hotel occupancy tax rates of any major metropolitan areas in the nation, with El Paso at 17 ½ percent, Houston at 17 percent, and San Antonio at 16 ¾ percent.<sup>6</sup>

In addition to local hotel occupancy taxes, all lodging properties operating in Texas are subject to a six percent state hotel occupancy tax.<sup>7</sup> Governed under Chapter 156 of the Texas Tax Code, the state hotel occupancy tax is administered by the Texas Comptroller. Funds from the state six percent hotel occupancy tax flow directly to the Texas Comptroller’s office and are largely used for the general governmental operations of the State. A portion of the state hotel occupancy tax revenue also goes toward funding tourism promotion through Texas’s ad campaign. Most Texans know this successful ad campaign by its famous tagline, “Texas, it’s like a whole other country.”

## **Collecting the Tax**

Under the Texas Tax Code, the following businesses are considered “hotels” and are required to collect hotel occupancy taxes from their guests: “Any building or buildings in which members of the public obtain sleeping accommodations for consideration” for less than 30 days, including a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or bed and breakfast facilities.<sup>8</sup> Additionally, a “short-term rental,” defined as the rental of all or part of a residential property to a person

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<sup>1</sup> Tex. Tax Code Ann. § 351.002(a) (Vernon 2017).

<sup>2</sup> § 351.0025(a).

<sup>3</sup> § 351.003(a).

<sup>4</sup> Tex. Loc. Gov’t Code § 334.254(d). Note that the 17 percent cap does not apply to a city that approved a higher hotel tax through a venue ballot proposition prior to September 1, 2013, such as El Paso.

<sup>5</sup> § 351.0025(b).

<sup>6</sup> Source: National Business Travel Association 2009 Survey.

<sup>7</sup> Tex. Tax Code § 156.051.

<sup>8</sup> Tex. Tax Code § 156.001(a); 34 Tex. Admin. Code Ann. § 3.161(a)(3) (Vernon 2017).

who is not a permanent resident, is subject to hotel occupancy taxes.<sup>9</sup> The Texas Administrative Code also includes “manufactured homes, skid mounted bunk houses, residency inns, condominiums, cabins, and cottages within the definition of a “hotel” if the facility is rented for periods of under 30 days.<sup>10</sup> Hospitals, sanitariums, nursing homes, dormitories or other non-hotel housing facilities owned by institutions of higher education, and oilfield portable units do not collect the tax.<sup>11</sup> Subject to various exemptions, the hotel tax is imposed on any “person” who pays for the use of a room in a hotel, including corporations, organizations, and other legal entities. The hotel room must cost \$2 or more per day for the local hotel tax to apply, and \$15 or more per day for the state hotel tax to apply.<sup>12</sup>

### **Meeting rooms versus sleeping rooms:**

The rental of sleeping rooms in hotels is subject to both state and local hotel taxes. However, there is a difference in how state and local hotel taxes apply to the rental of hotel meeting rooms. While the rental of sleeping rooms in hotels are subject to both state and local hotel taxes, meeting room rentals are not subject to local hotel occupancy taxes.<sup>13</sup> The rental of a meeting room or meeting space in a hotel is subject to the state 6 percent hotel occupancy tax, provided the room or space is physically located in a structure that also contains sleeping rooms.<sup>14</sup> For meeting rooms and banquet halls located in a structure that is physically separated from a structure that contains sleeping rooms, neither state nor local hotel occupancy taxes apply to that rental of those meeting rooms or banquet halls, provided rental costs or charges are separately stated from any lodging costs or charges on the guest’s invoice or receipt.<sup>15</sup>

However, it must be noted that sales tax may apply to the costs associated with the rental of meeting rooms or banquet halls located in a structure that is physically separated from a structure that contains sleeping rooms, if the lodging facility provides food or beverage service that is subject to sales tax.<sup>16</sup> Such sales tax would apply to the meeting room or banquet hall rental costs or charges regardless of whether the food or beverage charges are separately stated on the guest’s invoice or receipt.<sup>17</sup>

### **Food and beverage and other hotel charges:**

Certain charges assessed by a hotel to a guest are subject to hotel occupancy taxes, while other added charges are subject to state and local sales tax. Common hotel charges usually subject to sales taxes (but generally not subject to hotel occupancy taxes) are banquet service fees, food and beverage fees, movie rentals, dry cleaning/laundry services, internet connection, parking, and portage or bellhop fees.

Hotel charges related to occupancy of a sleeping room or readying a sleeping room for occupancy are usually subject to hotel occupancy taxes only. Common hotel charges subject to hotel occupancy tax are rollaway bed charges, pet charges, smoking fees, room damage fees, room safe charges, and late or early checkout fees.<sup>18</sup> It is important to note that if a hotel offers services as part of a package rate included with lodging, and the price of a specific good or service is not separately stated on a guest’s invoice, bill, or folio, the entire package is subject to hotel occupancy taxes.<sup>19</sup>

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<sup>9</sup> Tex. Tax Code § 156.001(c).

<sup>10</sup> Tex. Tax Code § 156.001(a); 34 Tex. Admin. Code Ann. § 3.161(a)(3) (Vernon 2017).

<sup>11</sup> Tex. Tax Code § 156.001.

<sup>12</sup> Tex. Tax Code § 156.051(a); § 351.002(a).

<sup>13</sup> *Id.*

<sup>14</sup> Tex. Tax Code § 156.051(a); Tex. Comptroller Opinion Letter No. 200103106L, Mar. 9, 2001.

<sup>15</sup> *Id.*

<sup>16</sup> 34 Tex. Admin. Code Ann. § 3.161(a)(3) (Vernon 2017); Tex. Comptroller Opinion Letter No. 201010556L, Oct. 2010.

<sup>17</sup> *Id.*

<sup>18</sup> THLA maintains a list of most hotel charges and which tax, if any is assessed on a particular charge. This list is available upon request to THLA members.

<sup>19</sup> Tex. Comptroller Opinion Letter No. 200102031L, Feb. 7, 2001.

Additionally, a special rule applies to whether hotel occupancy taxes are imposed on a hotel room rental cancellation fee. A 1989 Texas Comptroller's hearing concluded that hotel taxes are not due on charges to guests who 1) cancel more than 30 days before the scheduled stay begins, or 2) when the charge to the guest is less than the reserved room rate.<sup>20</sup> This rule applies both to individual reservations and also to group contracts.<sup>21</sup>

#### **Application of local hotel tax rate increases on pre-existing contracts**

If a municipality increases its hotel tax rate, the increased tax rate does not apply to a hotel room under a contract that was executed before the date the increased rate takes effect and if the contract provides for payment of the tax at the rate in effect when the contract was executed.<sup>22</sup> This statute does not apply if the contract's terms state that the contract is subject to change or modification from a tax rate increase.<sup>23</sup>

## **Exemptions from the Local Tax**

Texas law provides certain hotel tax exemptions based on the length of a guest's stay or the guest's affiliation with an exempt organization. Texas law is more permissive for exemptions from the state 6% hotel occupancy tax than it is for local hotel tax exemptions. The state hotel occupancy tax allows for an exemption for the following entities: educational, charitable, and religious entities are often exempt from the state hotel occupancy tax. These entities are *not exempt* from local hotel occupancy taxes.<sup>24</sup>

Focusing specifically on the local hotel occupancy taxes, there are primarily four categories of exemptions permitted from municipal and county hotel occupancy taxes:

- 1) **Federal Employees:** Federal employees traveling on official business;
- 2) **Diplomats:** Foreign diplomats with a tax exempt card issued by the U.S. Department of State;
- 3) **High Ranking State Officials:** A very limited number of state officials with a hotel tax exemption card (e.g. heads of state agencies, state legislators and legislative staff, members of state boards and commissions, and state judges); and
- 4) **Permanent Resident/Over 30 Day Stay:** Persons or businesses who have agreed in advance to use a hotel room for more than 30 consecutive days (i.e. the "permanent resident" hotel tax exemption).<sup>25</sup>
- 5) A full version of this article with information including expanded information on tax exemptions is available by contacting THLA.

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<sup>20</sup> Texas Comptroller's Hearing Decision No. 24,654 (1989).

<sup>21</sup> *Id.*

<sup>22</sup> Tex. Tax Code § 351.007.

<sup>23</sup> *Id.*

<sup>24</sup> Tex. Tax Code § 156.102.

<sup>25</sup> Tex. Tax Code § 156.104.

## **Penalties for Failure to Report or Collect the Tax**

The local hotel occupancy tax statutes provide for specific penalties a city may assess against hotel operators who fail to file the hotel tax collections report, file late or without full payment, or produce false tax returns.<sup>26</sup>

A full version of this article with information including expanded information on hotel tax penalties is available by contacting THLA.

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<sup>26</sup> § 351.004.

## **Use of Local Hotel Occupancy Tax Revenues**

There is a two-part test for every expenditure of local hotel occupancy tax.<sup>27</sup>

**Criteria #1: First, every expenditure must DIRECTLY enhance and promote tourism AND the convention and hotel industry.<sup>28</sup>**

Under the Tax Code, every event, program, or facility funded with hotel occupancy tax revenues must be likely to do two things: 1) directly promote tourism; and 2) directly promote the convention and hotel industry.<sup>29</sup> “Tourism” is defined under Texas law as guiding or managing individuals who are traveling to a different, city, county, state, or country.<sup>30</sup> A “direct” promotion of the convention and hotel industry has been consistently interpreted by the Texas Attorney General as a program, event, or facility likely to cause increased hotel or convention activity.<sup>31</sup> This activity may result from hotel or convention guests that are already in town and choose to attend the hotel tax funded facility or arts or historical event, or it may result from individuals who come from another city or county to stay in an area lodging property at least in part to attend the hotel tax funded event or facility.

If the funded event or facility is not reasonably likely to directly enhance tourism and the hotel and convention industry, local hotel occupancy tax revenues cannot legally fund it.<sup>32</sup> However, it is important to note that events and facilities that do not qualify for hotel occupancy tax funding are often still legally eligible for city funding from most of the other funding sources available to the city (general property tax revenues, general sales tax revenues, franchise fee revenues, etc.). State law is stricter in terms of how the local hotel occupancy tax revenues can be spent.

There is no statutory formula for determining the level of impact an event must have to satisfy the requirement to directly promote tourism and hotel and convention activity.<sup>33</sup> However, communities with successful tourism promotion programs generally award the amount of the hotel occupancy tax by the proportionate impact on tourism and hotel activity incident to the funding request. Entities applying for hotel occupancy tax revenue funding should indicate how they will market the event to attract tourists and hotel guests. If an entity does not adequately market its events to tourists and hotel guests, it is difficult to produce an event or facility that will effectively promote tourism and hotel activity.

A city or delegated entity should also consider whether a funded event will be held in a venue that will likely attract tourists and hotel guests. For example, if an event is held in a local school or community center, it may be less likely to attract tourists than if it is held at a local performing arts venue, museum or civic center. Each community will need to assess whether the facility hosting the function is likely to attract tourists and hotel guests. Similarly, if an event is a community picnic, local parade, educational class, or other similar type of event, it is often not likely to attract tourists and hotel guests, and would likely not be eligible for hotel occupancy tax funding.

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<sup>27</sup> §§ 351.101(a), (b).

<sup>28</sup> §§ 351.101(b).

<sup>29</sup> *Id.*

<sup>30</sup> § 351.001(6).

<sup>31</sup> See Op. Tex. Att’y Gen. Nos. GA-0124 (2003), JM-690 (1987).

<sup>32</sup> *Id.*

<sup>33</sup> See generally Tex. Tax Code §§ 351.101(a), (b).

Finally, it is a good practice to utilize a hotel tax application form. THLA has a sample hotel occupancy tax application form and a “post event” form that are already in use by many city governments throughout Texas. For a copy of these two forms, simply call THLA at (512) 474-2996, or email THLA at [news@texaslodging.com](mailto:news@texaslodging.com). These forms pose questions of funding applicants such as “Do you have a hotel room block for your events?” and “What do you expect to be the number of room nights sold for this event?” Additionally, the application asks if the entity has negotiated a special hotel price for attendees of their funded event. If the entity does not find the need to reserve a hotel block or negotiate a special hotel rate, it is not likely that they anticipate their event/s will have a meaningful impact on hotel activity.

Funded entities can also visit with area hoteliers who, in many cases, can provide feedback on whether any of their hotel guests expressed an interest in attending such events or facilities in the past. Hotel front desk and management staff usually know what local events and facilities were of interest to their guests by notes in their reservation systems, requests for directions, information and transportation to such venues by hotel patrons.

After an applicant’s event or program is offered for several years, the applicant should have a reasonable idea as to whether their event or program’s attendance includes a number of tourists and hotel guests. For example, some entities track whether guests are staying at local hotels via their guest registry. Other entities measure potential out-of-town attendance from their ticket sales records or other survey information.

It is important to note that Texas law also provides that the hotel occupancy tax may not be used for general revenue purposes or general governmental operations of a municipality.<sup>34</sup> It also may not be used to pay for governmental expenses that are not directly related to increasing tourism and hotel and convention activity.<sup>35</sup> For example, consider a request to use the hotel occupancy tax to pay for construction of additional lighting, restrooms, roads, sidewalks, or landscaping in a downtown area. These are expenditures for which the city would traditionally use its general revenues. Therefore, such an expenditure would violate the prohibition against using the hotel tax for “general governmental operations of a municipality.”<sup>36</sup> It is difficult to argue that such improvements to a non-tourism facility would “directly” promote tourism and hotel activity. At best, one could argue the improvements would “indirectly” enhance tourism and hotel activity—which is not sufficient under the clear language of the Tax Code to qualify for funding from the hotel occupancy tax.

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<sup>34</sup> Tex. Tax Code § 351.101(b); *see also* Op. Tex. Att’y Gen. Nos. JM-184 (1984), JM-965(1988).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

**Criteria #2: Every expenditure of the hotel occupancy tax must clearly fit into one of nine statutorily provided categories for expenditure of local hotel occupancy tax revenues.<sup>37</sup>**

The nine categories for expenditure of the hotel occupancy tax are as follows:

**1) Funding the establishment, improvement, or maintenance of a convention center or visitor information center.**

This category allows expenditures of the hotel tax for the creation, improvement, or upkeep of a convention center or a visitor information center.<sup>38</sup> The term “convention center” is defined to include civic centers, auditoriums, exhibition halls, and coliseums that are owned by the city or another governmental entity or that are managed in whole or in part by the city.<sup>39</sup> It also includes parking areas in the immediate vicinity of a convention center facility, and certain hotels that are owned by the city or another governmental entity, or that are managed in whole or in part by the city.<sup>40</sup> It does not include facilities that are not of the same general characteristics as the structures listed above.

Texas law specifies that for a facility to be funded as a convention center, it must be a facility primarily used to host conventions and meetings.<sup>41</sup> “Primarily used” in this context would arguably mean that more than 50 percent of the bookings for the facility are to host conventions or meetings that directly promote tourism and the hotel and convention industry.<sup>42</sup> In other words, holding local resident meetings in a facility would not count toward qualifying the facility as a convention center, but meetings of individuals from out-of-town who in part stay at hotels would qualify.

Simply naming a facility a convention center or visitor information center does not automatically qualify the facility as a “convention center.” The authority to use the hotel occupancy tax for facilities is limited and any such facility must meet the above noted “primary usage” test. For example, general civic buildings such as the city hall, local senior citizen centers or activity centers would not qualify as convention centers that could be funded by hotel tax.

**2) Paying the administrative costs for facilitating convention registration.**

This provision allows expenditures for administrative costs that are actually incurred for assisting in the registration of convention delegates or attendees.<sup>43</sup> This is generally an expenditure for larger cities that hold large conventions, and includes covering the personnel costs and costs of materials for the registration of convention delegates or attendees.

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<sup>37</sup> Tex. Tax Code § 351.101(a).

<sup>38</sup> § 351.101(a)(1).

<sup>39</sup> § 351.001(2).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; see generally Tex. Tax Code §§ 351.101(a), (b).

<sup>43</sup> Tex. Tax Code § 351.101(a)(2).

### **3) Paying for advertising, solicitations, and promotions that attract tourists and convention delegates to the city or its vicinity.**

This provision allows expenditures for solicitations or promotional programs/advertising directly related to attracting tourists and convention delegates to the city or its vicinity.<sup>44</sup> Such expenditures are traditionally in the form of internet, newspaper, mail, television, or radio ads; or solicitations to promote an event or facility. The advertising or promotion must directly promote the hotel and convention industry.<sup>45</sup> For example, the Texas Attorney General ruled that the local hotel occupancy tax may not be used for advertising or other economic development initiatives or improvements to attract new businesses or permanent residents to a city.<sup>46</sup>

In certain cases, a city may be able to use the advertising and promotion category to justify covering the costs of advertising an event that will attract tourists and hotel guests, even though the administrative or facility costs for the underlying event would not qualify for hotel tax funding.<sup>47</sup>

### **4) Expenditures that promote the arts.**

This section authorizes the expenditure of local hotel occupancy tax for a variety of art-related programs that also promote tourism and local hotel and convention activity.<sup>48</sup> Specifically, it allows funding the encouragement, promotion, improvement, and application of the arts including instrumental and vocal music, dance, drama, folk art, creative writing, architecture, design and allied fields, painting, sculpture, photography, graphic and craft arts, motion pictures, radio, television, tape and sound recording, and other arts related to the presentation, performance, execution and exhibition of these major art forms.<sup>49</sup> However, it is not enough that a facility or event promotes the arts; Texas law requires that the arts related expenditure also directly promote tourism and the hotel and convention industry.<sup>50</sup>

Section 351.101(a) of the Tax Code specifically states that “the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry.” The Texas Attorney General reaffirmed this standard when it held in Opinion GA-0124: “Under section 351.101 of the Tax Code, a municipality may expend its municipal hotel occupancy tax revenue only to promote tourism and the convention and hotel industry, and only for the specific uses listed in the statute.”

Additionally, the amount of funding a city allocates to the arts category may be limited by statute. See the “Special Rules” section of this guide

#### **Attorney General opinion on arts facilities**

In 2017, the Texas Attorney General issued opinion number KP-0131 regarding whether a city can expend hotel tax revenues for an arts-related facility under the arts category of the Tax Code. This opinion was requested by the City of Lakeway regarding funding the construction of a new performing arts center (referred to as “PAC”), to be owned by the City. The City of Lakeway requested an Attorney General

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<sup>44</sup> § 351.101(a)(3).

<sup>45</sup> § 351.101(b).

<sup>46</sup> Op. Tex. Att’y Gen. No. JM-690 (1987).

<sup>47</sup> See generally Tex. Tax Code § 351.101(a)(3).

<sup>48</sup> Tex. Tax Code § 351.101(a)(4).

<sup>49</sup> *Id.*

<sup>50</sup> § 351.101(b).

opinion on whether the City may legally use hotel occupancy tax revenue to pay for 1) a feasibility study for the PAC, and 2) the construction, operation, and maintenance of the PAC.

In Opinion KP-0131, the Attorney General took a strict position on using local hotel tax revenue for an arts facility. The opinion states that the phrase, "promotion of the arts," in the state statute does not expressly authorize the use of municipal hotel tax revenues for the construction of arts facilities. The opinion continues, "construction costs of theater facilities, considered alone, are not within the scope" of the arts category of hotel occupancy tax expenditures.<sup>51</sup> Based on this reasoning, it seems that the Texas Attorney General holds that funding of a physical structure with local hotel tax revenue must be coupled with some other authorized category of hotel tax expenditures aside from "promotion of the arts" alone.

## **5) Funding historical restoration or preservation programs.**

A city may spend a portion of its hotel occupancy tax revenues to enhance historical restoration and preservation projects or activities, or advertising and conducting solicitations and promotional programs to encourage tourists and convention delegates to visit preserved historic sites or museums that are likely to attract tourists and hotel guests.<sup>52</sup> Texas law does not limit such funding to structures that are owned by a public or nonprofit entity, or to whether the project is listed on a historic registry, but the city may choose to impose such limitations.

It is not enough that a project or activity event merely be historical in nature; Texas law requires that the historical related expenditure also directly promote tourism and the hotel and convention industry.<sup>53</sup> Section 351.101(a) of the Tax Code specifically states that "the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry." The Attorney General in Opinion GA-0124 (2003) reaffirmed this standard when it held: "Under section 351.101 of the Tax Code, a municipality may expend its municipal hotel occupancy tax revenue "only to promote tourism and the convention and hotel industry" and only for the specific uses listed in the statute."

Additionally, the amount of funding a city allocates to the historical programs category may be limited by statute. See the "Special Rules" section of this guide, starting on page 24.

## **6) Funding certain expenses, including promotional expenses, directly related to a sporting event within counties with a population of under 1 million.**

This section authorizes a municipality located in a county with a population of under 1 million to use local hotel occupancy tax revenue to fund certain expenses, including promotional expenses, directly related to a sporting event.<sup>54</sup> To qualify under this authorization, the sporting event must be one that would "substantially increase economic activity at hotels and motels within the city or its vicinity."<sup>55</sup> The statutory authorization also requires that a majority of the participants in the sporting event also be tourists to the area.<sup>56</sup>

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<sup>51</sup> Op. Tex. Att'y Gen. No. KP-0131 (2017).

<sup>52</sup> § 351.101(a)(5).

<sup>53</sup> § 351.101(b).

<sup>54</sup> § 351.101(a)(6).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

This category is intended to allow communities to fund the event costs for sporting tournaments that result in substantial hotel activity. For example, if a city had to pay an application fee to seek a particular sporting event or tournament, it could use hotel tax for such an expenditure if the sporting event would substantially increase economic activity at hotels and the city was within a county of under one million population. The requirement that a majority of the participants must be “tourists” is included in the statutory authority to prohibit the use of local hotel tax for sporting related facilities or events that are purely local (e.g.; local recreation centers, local little league and parks events, intramural sports, etc.).

## **7) Funding the enhancement or upgrading of existing sports facilities or sports fields for certain municipalities.**

Certain statutorily bracketed cities may use local hotel occupancy tax to enhance and upgrade existing sports facilities owned by the municipality.<sup>57</sup> The municipality must own the sporting facility, and the municipality must meet applicable population requirements. A full version of this article, with information including which cities are eligible for this category, is available by contacting THLA.

Texas law further requires that before local hotel tax to be used for this purpose, the sports facilities and fields must have been used a combined total of more than 10 times for district, state, regional, or national sports tournaments in the preceding calendar year.<sup>58</sup>

If hotel tax revenues are spent on enhancing or upgrading a sports facility, the municipality must also determine the amount of “area hotel revenue” generated by hotel activity from sports events held at the hotel tax funded facility for five years after the upgrades to the sport facility are completed.<sup>59</sup> The area hotel revenues that were generated from sports events at the hotel tax funded facility over that five year period must at least equal the amount of hotel tax that was spent to upgrade the sports facility.<sup>60</sup> If the amount of hotel tax that was spent on the facility upgrades exceeds hotel revenue attributable to events held at that facility over that five year period, the municipality must reimburse the hotel occupancy tax revenue fund any such difference from the municipality’s general fund.<sup>61</sup>

For example, if a city spent \$400,000 on improvements to its soccer fields, it would have to show at least \$400,000 in area hotel revenue directly attributable to events held at that soccer field over the five year period after the soccer field improvements were completed. If the city could only show \$300,000 in hotel industry revenue due to events held at that soccer field, the city would have to reimburse the city hotel tax with the \$100,000 difference from the city’s general fund.

## **8) Funding transportation systems for tourists**

Often with conventions and large meetings, there is a need to transport the attendees to different tourism venues. In 2007, the Texas Legislature authorized the use of city hotel tax for any sized city to cover the costs for transporting tourists from hotels to and near the city to any of the following destinations:

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<sup>57</sup> § 351.101(a)(7).

<sup>58</sup> Tex. Tax Code §§ 351.101(a)(7), 351.1076.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

- the commercial center of the city;
- a convention center in the city;
- other hotels in or near the city; and
- tourist attractions in or near the city.<sup>62</sup>

The reimbursed transportation system must be owned and operated by the city, or privately owned and operated but financed in part by the city.<sup>63</sup> For example, this authority could be used to cover the costs of a city to finance certain private shuttles to operate between the convention center and area hotels and attractions for a large city-wide convention. The law specifically prohibits the use of the local hotel tax to cover the costs for a transportation system that serves the general public.<sup>64</sup>

**9) Signage directing tourists to sights and attractions that are visited frequently by hotel guests in the municipality.**

In 2009, the Texas Legislature added a statutory category that allows cities to use municipal hotel occupancy tax revenue to pay for signage directing tourists to sights and attractions frequently visited by hotel guests in the municipality.<sup>65</sup> Arguably, this type of expenditure was permissible as “advertising and promotion” prior to this 2009 legislation. However, the Legislature codified this understanding to officially include signage directing tourists to sights and attractions that are frequently visited by hotel guests.<sup>66</sup>

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<sup>62</sup> § 351.110(a).

<sup>63</sup> § 351.110(b).

<sup>64</sup> § 351.110(c).

<sup>65</sup> § 351.101(a)(9).

<sup>66</sup> *Id.*

## **Administering Hotel Occupancy Tax Revenue Expenditures**

### **City reporting of information to the Texas Comptroller**

In 2017, the Texas Legislature passed a statute to require Texas cities to annually report hotel tax rate and spending information the State Comptroller. Specifically, the statute requires the city to report: 1) its municipal hotel tax rate, 2) any applicable venue tax rate, 3) the amount of hotel tax revenue collected for the preceding fiscal year, and 4) the amount and percentage of funds spent on each major category under state law.

The Comptroller will adopt rules to administer this new statute in the second half of 2017. These new rules will include a form for cities to complete when providing the information to the State.

### **Duty of funded entities to provide a list of activities.**

All entities (including the city itself) that are directly or indirectly funded by the local hotel occupancy tax are annually required to provide a list of the scheduled activities, programs, or events that will directly enhance and promote tourism and the convention and hotel industry.<sup>67</sup> This list is to be provided annually to the city secretary or his/her designee prior to the expenditure of the hotel occupancy tax funding by the funded entity.<sup>68</sup> An entity may add items to this list at any time, and each city decides the format for providing this information. This documentation requirement does not apply if the entity already provides written information to the city indicating which scheduled activities or events that it offers that directly enhance and promote tourism and the convention and hotel industry. For example, cities that require quarterly or annual reports on the use of hotel tax by hotel tax funded entities would satisfy this requirement if their report addresses the extent to which their events directly promote tourism and hotel activity.<sup>69</sup>

It is important to remember that if an entity does not have any such events or programs reasonably expected to directly promote tourism and the hotel and convention industry, it is not eligible for local hotel occupancy tax funding.<sup>70</sup> If only a portion of an entity's programs fit these criteria, then only a proportionate amount of that entity's costs should be covered by the local hotel occupancy tax.<sup>71</sup>

### **Delegating management of funded activities.**

The governing body of a city may delegate the management or supervision of programs funded by the hotel occupancy tax by written contract.<sup>72</sup> This delegation may be made to a person, another governmental entity, or to a private organization.<sup>73</sup> This delegation is often made to a local arts council, a chamber of commerce, or to the convention and visitors bureau. The municipality shall approve the entity's annual budget prior to delegating the management or supervision of hotel tax funded programs.<sup>74</sup> Furthermore, the municipality shall require the delegated entity to make periodic reports, at least

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<sup>67</sup> § 351.108(b).

<sup>68</sup> *Id.*; § 351.108(d).

<sup>69</sup> § 351.108(g).

<sup>70</sup> § 351.101(b).

<sup>71</sup> § 351.101(e).

<sup>72</sup> § 351.101(c).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

quarterly, listing the hotel occupancy tax expenditures made by the delegated entity.<sup>75</sup> Additionally, the Code requires that the contracted entity maintain complete and accurate financial records for every expenditure of hotel occupancy tax revenue, and upon the request of the municipality or another person, make the records available for inspection and review.<sup>76</sup>

An entity with delegated authority to manage hotel tax funded programs undertakes a fiduciary duty with respect to the use of the tax revenue.<sup>77</sup> Such entities are also required to maintain the city hotel occupancy tax revenue in a separate bank account that may not be commingled with any other account or funds.<sup>78</sup> The Tax Code does not contain similar prohibitions against commingling the funds for individual organizations, such as an arts or historical group that receives hotel tax funding for their individual program, but do not themselves oversee hotel tax funding to other entities.

### **Use of hotel occupancy tax revenues to cover administrative expenses.**

Texas law allows proceeds of the municipal hotel occupancy tax to be used to cover the portion of administrative costs that are directly attributable to work on activities that may be funded by the tax.<sup>79</sup> For example, entities that manage activities funded by the hotel occupancy tax may spend some of the tax for certain day-to-day operational expenses.<sup>80</sup> These expenses may include supplies, salaries, office rental, travel expenses, and other administrative costs.<sup>81</sup> However, these costs may be reimbursed only if the expenses are incurred in the promotion and servicing of expenditures authorized under the hotel occupancy tax laws.<sup>82</sup> The portion of the administrative costs that are covered should not exceed the percentage of the cost that is attributable to the activity funded by the hotel occupancy tax.<sup>83</sup> For example, administrators who spend 33 percent of their time overseeing hotel occupancy tax funded programs should seek funding for no more than 33 percent of their salary or 33 percent of other related overhead costs. Additionally, hotel occupancy tax revenues may be spent on travel that is directly related to the performance of the person's job in an efficient and professional manner.<sup>84</sup> This travel should facilitate the acquisition of skills and knowledge that will promote tourism and the convention and hotel industry.<sup>85</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> § 351.101(d).

<sup>77</sup> § 351.101(c).

<sup>78</sup> *Id.*

<sup>79</sup> § 351.101(e).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> § 351.101(f).

<sup>85</sup> *Id.*

## **Special Rules for Selected Municipalities**

The Texas Tax Code provides additional rules for certain Texas cities based on the city's population bracket. The Texas Tax Code provides additional rules for certain Texas cities based on the city's population brackets. A full version of this article with information on city-specific rules is available by contacting THLA.

## **Additional Information**

If a city or funded entity has additional questions about the administration or use of the hotel occupancy tax, it is welcome to contact the Texas Hotel & Lodging Association for assistance by phone at (512) 474-2996 or by email at [news@texaslodging.com](mailto:news@texaslodging.com). THLA has sample documents available to assist in administering hotel taxes, such as funding grant application forms, post event forms, and tax collection guidelines.

Texas city officials can also make inquiries to the legal staff of the Texas Municipal League at (512) 231-7400.

# THE HOTEL TAX “TWO-STEP”

By **Bill Longley**, TML Legislative Counsel



In the grand scheme of things, city hotel occupancy taxes account for just a small amount of city revenue. Property taxes and sales taxes are far more important to most cities. Why does it seem, then, that hotel taxes generate so much confusion and controversy?

The answer is this: Hotel taxes, unlike most other taxes, are levied on a specific category of businesses—hotels. As a result, these businesses tend to pay close attention to how cities expend these funds. Spend city sales taxes in a controversial way, and no particular category of business feels singled out enough to raise a fuss. Perceived misuses of hotel taxes, on the other hand, are a different story.

Fortunately, it's very easy for a city official to remember how to legally spend hotel taxes. A city simply needs to remind itself to always follow the "two-part test." The key element of a two-part test is – surprise – that it has two parts! Cities frequently remember to meet one element of the test, but then entirely forget the other part. This article will succinctly describe the two-part test, and then describe some common situations to which we can apply the test.

### Part 1: Heads in Beds

The first element of the two-part test is this: Every expenditure of hotel taxes must put "heads in beds." What this means is that every funded project must attract overnight tourists to the city's hotels and motels, thus promoting the city's hotel industry.

For example, how about a weekend-long arts and crafts show? There's a very good chance that out-of-town guests might come to visit such an event, so expenditure of hotel tax money on that event would likely qualify.

On the other hand, how about a quilting bee at a local nursing home? While a worthy cause, the quilting bee is unlikely to attract overnight tourists and, therefore, probably wouldn't qualify to receive hotel tax funds.

### Part 2: The Nine Categories

Once a project has cleared the first part of the test, it's time for – you guessed it – the second part of the test. Here it is: Every expenditure of hotel taxes must also fit into one of nine statutorily authorized categories. These are the nine categories: (1) convention and visitor centers; (2) convention registration; (3) advertising the city; (4) promotion of the arts; (5) historical restoration and preservation; (6) sporting events in a county under one million in population; (7) enhancing or upgrading existing sports facilities or sports fields (only in certain cities); (8) tourist transportation systems; and (9) signage directing the public to sights and attractions that

are visited frequently by hotel guests in the city.

Thus, even if an event puts heads in beds, it cannot receive hotel tax money unless it also fits into one of the nine categories. For instance, what about a livestock auction that will attract attendees from surrounding counties? While that event is likely to attract overnight tourists, it doesn't fit neatly into one of the nine categories. Therefore, it's likely not a valid recipient of hotel tax money.

It's not enough to meet one of the two prongs of the two-part test. A city must meet both! The following are some real-life examples that have been the focus of inquiries received by the Texas Municipal League (TML) Legal Department.

### Fireworks, Anyone?

The prototype hotel tax controversy is an event like a fireworks show or a parade. Cities frequently ask if they can fund a fireworks show with hotel tax money.

Let's subject a fireworks show to the two-part test. Does a fireworks show put heads in beds? The answer is "probably not," unless it is a truly spectacular event. But let's give it the benefit of the doubt. Suppose the Town of Pyrotechnic, Texas, truly does put on a fireworks extravaganza that attracts tourists from around the state. So far, so good.

But what about the second part of the test – the nine categories? Do fireworks shows fit neatly into any of the nine? Not really. Some may argue that such shows "advertise" the city, but this is likely not what that category means. Advertising the city literally means some sort of print or other media that explicitly promote the city. Otherwise, a city could simply say that any popular event "advertises" the city that holds it. Direct funding of fireworks displays and the like are, usually, not a very good fit.

### Signs of the Times?

Another frequent question concerns highway signs promoting the city. May a city fund a billboard touting the city's attractions, restaurants, and hotels? Let's put it to the two-part test. Heads in beds? Well, why not? If a billboard encourages motorists to stop in town, those motorists might stay the night, whereas without the sign they would have driven on to the next city. This is exactly what the statute intends. The nine categories? How about advertising? Prior to 2009, a convincing argument could be made that because a billboard literally advertises the city it refers to, that it would fit within the advertising category. All doubt was erased in 2009, when the Texas Legislature added the ninth category – signage directing the public to



sights and attractions. Travel signs are a perfect fit for hotel occupancy tax expenditures.

### Chambers of Commerce?

Cities frequently wonder if they can fund the local chamber of commerce using hotel tax money. Do chambers put heads in beds? Maybe, maybe not. Chambers of commerce are typically charged with promoting economic development, not tourism. Even assuming a chamber does promote tourism though, how about the nine categories? Funding a chamber doesn't, in itself, fall into any of the nine categories.

Fortunately, there is an easy solution. The laws governing hotel tax expenditures permit the city to delegate expenditure of hotel tax money to another entity, typically a chamber or convention and visitor bureau. As long as the chamber spends the money on projects that otherwise meet the two-part test mentioned above, it's fine to delegate some funds to them. There must be a written contract laying out the duties of the chamber, though. Also, the chamber must keep the hotel funds in an account separate from its general operating fund.

### Arts Organizations

City arts organizations are a common trouble area. It seems that every arts council in the state knows that promotion of the arts is one of the nine categories on which city hotel taxes may be expended. Cities know this because these

arts groups frequently come asking for the money.

The thing to remember about arts groups is this: Direct funding of the organization's operations does nothing in and of itself to put "heads in beds." Put another way, funding the operating budget of an arts council meets the second part of the test (promotion of the arts) but not necessarily the first.

The solution? The city should encourage the group to seek funding only for its festivals and shows that do, in fact, attract tourists to the city. By limiting the expenditure to such events, the city meets both parts of the test.

### Don't Forget to Report

Legislation passed in 2017 that requires cities to annually report hotel occupancy tax information to the comptroller, including information on how the funds are spent. Not later than February 20 of each year, a city that imposes a hotel occupancy tax must submit to the comptroller information that includes the city's hotel occupancy tax rate, the amount of revenue generated by the tax, and the amount and percentage of the revenue spent for each of the following purposes:

- Convention or information centers
- Convention delegates registration
- Advertising to attract tourists
- Arts promotion and improvement
- Historical restoration and preservation projects
- Signage directing the public to sights and attractions

Cities must comply with the annual reporting requirements by either submitting the report to the comptroller on a form prescribed by the comptroller, or alternatively providing the comptroller a direct link to, or a clear statement describing the location of, the information required to be reported that is posted on the city's website.

### What Else?

There are numerous other technical details about how to legally expend hotel tax funds. In truth, by simply learning and remembering the two-part test, city officials are 99 percent of the way toward full compliance with hotel tax laws. City officials with questions about the hotel occupancy tax should call the TML Legal Department at 512-231-7400. ★