

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

For many counties, the rules for using the county hotel occupancy tax are the same as the general rules applicable to cities for use of this tax. This is based on Tax Code Section 352.1031, that states that unless otherwise provided, the county hotel occupancy tax can only be used for the purposes authorized under Section 351.101 (the general rules applicable to city expenditures of the tax). Appendix A of this article contains a chart, listing all counties in Texas authorized to implement a local hotel occupancy tax. The chart also provides the county's maximum hotel tax allowable under Texas law, as well as a citation for any limitations or special rules for the county.

This guide addresses both the general rules applicable to many counties, as well as special rules for specific counties. If the county does not fall into any of the special categories but does fit into one of the population brackets contained in Chapter 352 of the Tax Code, state law provides that such authorized counties must follow the same general rules that apply to city expenditures of the hotel occupancy tax. These rules are contained in Section 351.101 of the Tax Code. Section 351.101 provides a two-part test that every expenditure of local hotel occupancy tax by these counties must meet to be valid.

## **Use of Tax Revenues: Generally Authorized Counties**

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

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. "Tourism" is defined under Texas law as guiding or managing individuals who are traveling to a different, city, county, state, or country. 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. 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 hotel tax 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. 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 county funding from most of the other funding sources available to the county (general property tax revenues, certain 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. However, communities with successful tourism promotion programs often condition the amount of hotel occupancy tax that is awarded to the proportionate impact of the event or facility 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 county 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.

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 county 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 space or room 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.

City staff and 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 a hotel tax grant recipient’s event or program is offered for several years, the recipient 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 event guest log or surveys. 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 county. It also may not be used to pay for governmental expenses that are not directly related to increasing tourism and hotel and convention activity. 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 county 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 county.” 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.

**Criteria #2: Every expenditure of the county hotel occupancy tax must clearly fit into one of seven statutorily provided categories for expenditure of local hotel occupancy tax revenues.**

The seven 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. A visitor information center may be operated by the county, or by another entity such as a city or a chamber of commerce. If the visitor information center facility and staff serve, multiple purposes (e.g. chamber staff or a chamber facility that is both the chamber office and a visitor center), the cost of the visitor center can only be covered by local hotel tax to the extent the facility is used for activities related to directly funding hotel activity.

The term “convention center” is defined to include civic centers, auditoriums, exhibition halls, and coliseums that are owned by the county or another governmental entity or that are managed in whole or in part by the county. It also includes parking areas in the immediate vicinity of a convention center facility, and certain hotels that are owned by the county or another governmental entity, or that are managed in whole or in part by the county. 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. “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. 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 county courthouse, 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 local hotel tax expenditures for administrative costs that are actually incurred for assisting in the registration of convention delegates or attendees. This is generally an expenditure by bigger communities that hold large conventions, and includes covering the personnel costs and costs of materials for the registration of convention delegates or attendees.

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

This provision allows expenditures for solicitations or promotional programs/advertising directly related to attracting tourists and convention delegates to the county or its vicinity. 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. 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 county.

In certain cases, a county 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.

### **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. 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. 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.

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."

THLA and Texans for the Arts (TFA) have created a memorandum of understanding to assist local governments in implementing hotel tax laws as they relate to the arts. In order to comply with the hotel occupancy tax statute, THLA and TFA agree that to be eligible for arts funding from HOT revenues, arts related recipients must satisfy the following requirements:

1. The recipient must present, perform, promote, encourage or otherwise make possible, artistic events, cultural performances, programs, exhibitions or lectures involving any of the major art forms listed in Texas Tax Code Section 351.101 (a) (4), or "other arts related to the presentation, performance, execution and exhibition of these major art forms."
2. The hotel occupancy tax funded programs, facilities, and/or events must be advertised and open to the general public.
3. The hotel occupancy tax for funded programs, facilities, and/or events must be expended in a manner that directly enhances and promotes tourism and the convention and hotel industry.

With regard to the requirement within Number 3 above regarding directly enhancing and promoting tourism and the convention and hotel industry, THLA and TFA agree that the Tax Code does not require a recipient to demonstrate a proportionate level of direct impact on tourism and the convention and

hotel industry to be eligible for local hotel tax revenue funding. However, the demonstration of some level of direct impact on tourism and the convention and hotel industry is required.

The following factors may be beneficial to consider, but this list is neither exhaustive nor mandatory:

- a. Offering Arts Events as Part of a Tourism/Hotel Event: The hotel tax funded arts entity can show a direct impact on the hotel and convention industry by providing entertainment or arts related services for conventions, conferences and meetings that are attended in whole or part by convention and/or hotel guests.
- b. Use of Hotel Facilities/Services by the Arts: The hotel tax funded arts entity can show a direct impact on the hotel and convention industry by using local lodging facilities and/or lodging services for galas or other events that are held by the hotel tax funded arts entity. A direct impact on hotels can also be shown through the use of hotel dining or hotel entertainment facilities by arts patrons either before and/or after hotel tax funded arts events.
- c. Creating or Causing Room Night Activity at Area Hotels: The hotel tax funded arts entity can show a direct impact on the hotel and convention industry through the reservation of hotel rooms for visiting artists and/or showing other hotel activity that is directly attributable to the hotel tax funded arts event or facility.
- d. Surveying of Attendees at Arts Related Events: The hotel tax funded arts entity can show a direct impact on the hotel and convention industry through audience or attendee questionnaires, polling, hotel block booking codes, or other methods that show hotel night or other hotel or convention activity that is directly attributable to the hotel tax funded arts event or facility. Surveying of Attendees at Arts Related Events: The hotel tax funded arts entity can show a direct impact on the hotel and convention industry through audience or attendee questionnaires, polling, hotel block booking codes, or other methods that show hotel night or other hotel or convention activity that is directly attributable to the hotel tax funded arts event or facility.

There are many success stories of counties that have partnered with the arts entities to turn one day arts events into multi-day events that can substantially increase tourism and hotel activity. Such partnerships and long-term planning can help both foster the arts and grow hotel tax proceeds that can be made available to the arts and other eligible uses.

The percentage of total local hotel tax funds that funding a city may allocate to the arts category is limited by state statute. See the "Special Rules" section of this guide, starting on page 24.

### **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 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 concluded, "construction costs of theater facilities, considered alone, are not within the scope" of the arts category of hotel occupancy tax expenditures. 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 specifically authorized under some other statutory category of hotel tax expenditures, aside from the general “promotion of the arts” category.

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

A county 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. 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 county 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. 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.”

**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 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. 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.” The statutory authorization also requires that a majority of the participants in the sporting event also be tourists to the area.

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 county 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 county was within a county of under one million population. The added requirement that a majority of the participants must be “tourists” was included to prevent 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) Signage directing tourists to sights and attractions that are visited frequently by hotel guests in the county.**

In 2009, the Texas Legislature added a statutory category that allows counties to use county hotel occupancy tax revenue to pay for signage directing tourists to sights and attractions frequently visited by hotel guests in the community.

## **Summary of the Seven Uses for the Local Hotel Occupancy Tax**

In summary, local hotel occupancy tax revenues only may be spent to establish or enhance a convention center or visitor information center, cover the administrative expenses for registering convention delegates, pay for tourism-related advertising and promotions, fund arts programs or facilities that will directly promote tourism and hotel and convention activity, fund historic restoration or preservation projects that will enhance tourism and hotel and convention activity, in certain cities noted above fund certain costs for holding sporting events that substantially increase local hotel activity, and pay for signage directing tourists to sights and attractions frequently visited by hotel guests. If the county cannot fit an expenditure within one of these categories, hotel occupancy tax revenues cannot be used for that purpose, unless a special state statute was passed to allow such additional uses. This article includes a summary beginning on page 24 of special provisions and limitations placed on counties that fall into certain population brackets or special geographic areas of the state.

With regard to the use of local hotel occupancy taxes, there is no time limit for a county to expend all of its hotel occupancy tax funds. Additionally, state law requires that interest earned on hotel tax must be spent in the same way as other hotel tax revenues. State law does not address revenues that are earned from events funded by the local hotel occupancy tax.

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

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

All entities (including the county itself) 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. This list is to be provided annually to the commissioners or their designee prior to the expenditure of the hotel occupancy tax funding by the funded entity. An entity may add items to this list at any time, and each county decides the format for providing this information. This documentation requirement does not apply if the entity already provides written information to the county indicating which scheduled activities or events that it offers that directly enhance and promote tourism and the convention and hotel industry. For example, counties 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.

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. If only a portion of an entity's programs fit this criterion, then only a proportionate amount of that entity's costs should be covered by the local hotel occupancy tax.