



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 25, 2021

The Honorable Rafael Anchía  
Chair, Committee on International Relations  
& Economic Development  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

**Opinion No. KP-0350**

Re: Whether hotel occupancy tax revenue may be used to fund a public space at an apartment complex under section 351.101 of the Tax Code (RQ-0368-KP)

Dear Representative Anchía:

You ask about the use of hotel occupancy tax revenue to fund a public space at an apartment complex under section 351.101 of the Tax Code.<sup>1</sup> You describe an agreement which calls for the payment of hotel occupancy tax revenue upon completion of a public space and clubhouse. *See* Request Letter at 1. You tell us the agreement describes “the space located within the apartment complex as a ‘public space’ [to be used] to display art exhibits and [for] gatherings.” *Id.* You question the propriety of the expenditure from hotel occupancy tax revenue. *See id.* As an initial matter, this office cannot always determine whether a particular expenditure satisfies Tax Code section 351.101 as a matter of law because of the fact issues involved. *See* Tex. Att’y Gen. Op. Nos. KP-0281 (2020) at 1 (noting also that the determination lies in the first instance with the municipality, subject to judicial review), KP-0131 (2017) at 2 (same).

Chapter 351 of the Tax Code governs municipal hotel occupancy taxes. *See* TEX. TAX CODE §§ 351.001–.160. Section 351.002 authorizes a municipal tax on the use or possession of a hotel room. *Id.* § 351.002(a). Section 351.101 provides for the use of the resulting tax revenue. *See id.* § 351.101. In its operation, section 351.101 has two primary aspects. First, an expenditure of hotel occupancy tax revenue must be used only to “promote tourism and the convention and hotel industry.” *Id.* § 351.101(a), (b) (requiring that “[r]evenue derived from the tax authorized by this chapter shall be expended in a manner directly enhancing and promoting tourism and the convention and hotel industry as permitted by Subsection (a)”). This first aspect requires the expenditure to “directly” promote tourism and the hotel industry. *Id.* § 351.101(b); *see also* Tex.

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<sup>1</sup>*See* Letter and Attachments from Honorable Rafael Anchía, Chair, House Comm. on Int’l Relations & Econ. Dev., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 31, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0368KP.pdf> (“Request Letter” and “Attachments”).

Att’y Gen. Op. Nos. KP-0281 (2020) at 3 (discussing directly), KP-0131 (2017) at 1–2 (same). Chapter 351 defines “tourism” as the “guidance or management of tourists.” TEX. TAX CODE § 351.001(5). And a “tourist” is an “individual who travels from the individual’s residence to a different municipality . . . for pleasure, recreation, education, or culture.” *Id.* § 351.001(6). This aspect thus requires a hotel occupancy tax revenue expenditure to be “one that *directly* guides or manages tourists to the municipality for pleasure, recreation, education, or culture.” Tex. Att’y Gen. Op. No. KP-0131 (2017) at 2.

The second aspect limits the expenditure to one of the specified permissible uses in subsection 351.101(a).<sup>2</sup> TEX. TAX CODE § 351.101(a)(1)–(11); Tex. Att’y Gen. Op. No. JM-965 (1988) at 2. Of these, the permissible use most relevant to your request is the one that allows for promotion of the arts:

(4) 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.

TEX. TAX CODE § 351.101(a)(4). This provision generally limits an expenditure in support of the arts to not more than fifteen percent of the occupancy tax revenue.<sup>3</sup> *See id.* § 351.103(c). Further, this office opined that subsection 351.101(a)(4) does not expressly authorize *construction* of facilities. *See* Tex. Att’y Gen. Op. No. KP-0131 (2017) at 2; *compare* TEX. TAX CODE § 351.101(a)(1), *with id.* § 351.101(a)(4). Opinion KP-0131 concluded that construction costs, considered alone, are not within the scope of subsection 351.101(a)(4), and that any construction costs associated with any particular facility are proper costs for the hotel occupancy tax revenue only if they are incurred under subsection 351.101(a)(1). Tex. Att’y Gen. Op. No. KP-0131 (2017) at 2. An expenditure made under subsection 351.101(a)(4) must conform to these limitations to satisfy the second aspect.

Using this analytical framework, we consider the expenditure you describe for the public space in the apartment complex. While this office does not ordinarily construe contracts in an attorney general opinion, it can address certain issues if they can be answered as a matter of law. *See* Tex. Att’y Gen. Op. No. GA-0176 (2004) at 2 (noting that attorney general opinions do not construe contracts but may “address a public entity’s authority to agree to a particular contract term, if the question can be answered as a matter of law”). The agreement you attach to your request letter provides that the developer “agrees to provide a public service for the *benefit of the*

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<sup>2</sup>Section 351.101 further provides that the hotel occupancy tax revenue may not be used for the “general revenue purposes or general governmental operations of a municipality.” TEX. TAX CODE § 351.101(b).

<sup>3</sup>Chapter 351 imposes other limitations on expenditures in support of the arts. *See id.* §§ 351.1035(c) (imposing same fifteen percent limitation on certain municipalities in border counties), 351.1075 (imposing higher percentage limitation on revenue spending in certain municipalities of which a portion is designated as a cultural arts district provided the municipality makes certain findings), 351.1077(c) (authorizing additional expenditure of revenue for the arts for municipalities with specified demographics and construction bond issuance).

*residents* [and] will hold monthly exhibitions and performances at the property highlighting artists and musicians from throughout the valley.” Attachments, “Memorandum of Understanding” at 2, (Terms and Other Conditions ¶ 3) (emphasis added). To the extent the proposed space is for the “residents” of the apartment complex and does not directly guide or manage tourists to the municipality for pleasure, recreation, education, or culture, or otherwise promote tourism and the convention and hotel industry, then it does not satisfy the first aspect in subsection 351.101(b), and we need not consider whether the expenditure also satisfies the second aspect subsection 351.101(a)(4). While that question is ultimately a fact question, a court is unlikely to determine that the expenditure as you describe it is an authorized expenditure of hotel occupancy tax revenue.

**S U M M A R Y**

Chapter 351 of the Tax Code authorizes an expenditure of hotel occupancy tax revenue in the direct promotion of tourism and the convention and hotel industry, provided the expenditure is for one of the specified uses listed in the statute. To the extent the particular agreement about which you ask expressly provides that the public space is intended to benefit the residents of the apartment complex and does not promote tourism and the convention and hotel industry, it does not satisfy section 351.101. While it is ultimately a fact question, a court is unlikely to determine that the expenditure as described is an authorized expenditure of hotel occupancy tax revenue.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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