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OPINION COMMITTEE

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August 23, 2005

FILE # ML-44357-05

I.D. # 44357

The Honorable Greg Abbott  
Attorney General of the State of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

**RQ-0390-GA**

Re: Authority of a county to impose and collect a Local Hotel Occupancy Tax in the Extraterritorial Jurisdiction of a municipality, where the municipality is presently collecting such a tax, and related questions

Dear General Abbott:

Please accept this letter as a formal request for an opinion from your office concerning the authority of a county to impose a Local Hotel Occupancy Tax within the extraterritorial jurisdiction of a municipality, where such municipality is presently collecting such a tax, and related questions. The facts surrounding the situation at hand are as follows:

The City of Glen Rose (located in Somervell County, Texas), by ordinance, imposed a "Local Hotel Occupancy Tax" of seven percent (7%) on hotels within its city limits, under the provisions of V.T.C.A., Tax Code, Section 351.002, and also on hotels within its extraterritorial jurisdiction (ETJ), under the provisions of Section 351.0025(a) of the Code. The ordinance became effective on October 1, 1996, and the City currently collects taxes from three different qualifying hotels within its ETJ.

The Commissioners Court of Somervell County subsequently expressed a desire to be able to impose a "Local Hotel Occupancy Tax", and is so authorized under the provisions of V.T.C.A., Tax Code, Section 352.002(9). However, if the County did impose such a tax, then such tax would be in addition to that already imposed by the City of Glen Rose on Hotels located within its municipal boundaries, because Somervell County (being a county with a population of less than 12,000, and an area of less than 275 square miles) was not "exempted" under Section 352.002(d). Therefore, Somervell County supported the amendment of V.T.C.A., Tax Code, Section 352.002(d), by adding "(9)" to the subsections exempted, so that Somervell County could impose a "Local Hotel Occupancy Tax" not to exceed seven percent (7%) on hotels within its boundaries, and not "overly burden" those hotels within the city limits of the City of Glen Rose. This amendment was passed in the Regular Session of the 79<sup>th</sup> Legislature, under HB 1773, to become

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effective on September 1, 2005. Accordingly, on the 11<sup>th</sup> day of July, 2005, the Commissioners Court of Somervell County passed an order imposing a tax of seven percent (7%) on all hotels within the confines of Somervell County, Texas, to begin on September 1, 2005.

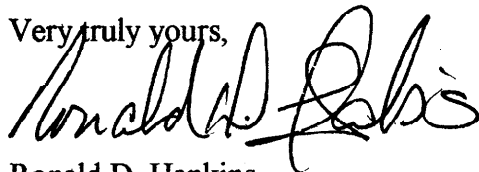
The question posed by this request centers over the interpretation of V.T.C.A., Tax Code, Section 351.0025(b), which states: "The municipality may not impose a tax under this section if as a result of the adoption of the combined rate of state, county, and municipal hotel occupancy taxes in the extraterritorial jurisdiction exceeds 15 percent of the price paid for a room in a hotel." Obviously, if the rates of the City (7%) and the County (7%) are added to the state tax rate (6%), this exceeds the 15 percent limit under 351.0025(b). The wording of Section 351.0025(b) seems to indicate that a municipality may only impose and collect a hotel occupancy tax in its ETJ, if either (a) the County is not collecting a tax, or the total of state, county and municipal taxes do not exceed 15 percent, regardless of whether the municipality imposed their taxes prior to the County doing so. However, the wording of the paragraph could also be interpreted to be a "first come, first served" rule. Since the City of Glen Rose imposed their hotel occupancy tax first, do they have priority, or, on the other hand, does the County have absolute priority?

#### SUMMARY

My questions are therefore: (1) " Under the provisions of V.T.C.A., Tax Code, Section 351.0025(d), does a county have priority over a municipality on local hotel occupancy taxes imposed within the ETJ of the municipality, and must the municipality, therefore, cease to collect their hotel occupancy taxes on the hotels located within its ETJ?" and (2) "If a county does have priority over the municipality, and if the county tax rate is 7 percent and the state tax rate is 6 percent, can the municipality change its tax rate on hotels within its ETJ to 2 percent, so that the 15 percent limit is not exceeded?"

Should you require any further information concerning this matter, please feel free to contact me.

Very truly yours,



Ronald D. Hankins  
County Attorney  
Somervell County

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September 6, 2005

FILE # ML-44357-05  
I.D. # 44391

The Honorable Greg Abbott  
Attorney General of the State of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

Attn: Nancy S. Fuller  
Chair, Opinion Committee

Re: Brief on: Authority of a county to impose and collect a Local Hotel  
Occupancy Tax in the Extraterritorial Jurisdiction of a municipality, where the  
municipality is presently collecting such a tax, and related questions

Dear Ms. Fuller:

Please accept this as my brief on the subject of my requested opinion from your office. As you are aware, the question I have posed involves the interpretation of V.T.C.A., Tax Code, Section 351.0025(b), which states in full as follows: "(b) The municipality may not impose a tax under this section if as a result of the adoption the combined rate of state, county and municipal hotel occupancy taxes in the extraterritorial jurisdiction exceeds 15 percent of the price paid for a room in a hotel."

A check of the "Historical and Statutory Notes" indicates that subsection (b) was added by Acts 1993, 73<sup>rd</sup> Leg., ch. 680, Sec. 2, eff. Sept. 1, 1993. There are no "Notes of Decisions", either in the form of Court cases, or Attorney General's Opinions listed for this statute. After having searched on the internet, I have determined that the legislation, which added subsection (b), was apparently contained in SB 92 of the 73<sup>rd</sup> Legislature. Unfortunately, I have been unable to locate any real legislative history on this bill, including various versions, other than the vote on the bill. There seems to be electronic information available on the web for the 74<sup>th</sup> Legislature to present, but not for Legislative Sessions prior. The only information that seems to be available is that of copies of the tapes of the Legislative Sessions, and I fear that would entail more than the 14 days in which I have been given to reply to your request.

That being said, a literal reading of the subsection in question seems to "pre-suppose" that the County has already imposed a hotel occupancy tax which covered eligible hotels within the municipality's extraterritorial jurisdiction. In the case at hand, that was not

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true. Reference: my letter of August 23, 2005. The City of Glen Rose had legally imposed the tax in 1996, under the provisions of V.T.C.A., Tax Code, Section 351.0025. The County of Somervell did not impose the tax until this year (2005), after having obtained a legislative amendment to V.T.C.A., Tax Code, Section 352.002(d), in order to do so, without "double taxation" on hotels located in the City of Glen Rose. The wording of subsection (b) certainly seems to intend that the County have preferential treatment for imposing a hotel occupancy tax on hotels located within a municipality's extraterritorial jurisdiction, assuming that the County had imposed such a tax prior to the municipality attempting to do so. If one interprets that the Legislature intended for a County to have "absolute" preference, then the outcome of the analysis is simple: "If a County taxes hotels within the extraterritorial jurisdiction of a municipality, and the combined rates of state, county and municipality exceed 15%, then the municipality may not impose the tax. And, conversely, if a municipality has already legally imposed the tax (i.e., the County had not previously imposed the tax), then the municipality must withdraw its taxation of the hotels within its extraterritorial jurisdiction, if the County subsequently imposes the tax, *and*, if the total of state, county and municipal taxes exceed 15 percent." But, would not this interpretation result in making the once "legal" imposition of a tax by a municipality "illegal" by virtue of the County subsequently imposing the tax? This gives me much consternation. In fact, such an interpretation would seem to "fly in the face" of the provisions of Art. I, Section 10 of the United States Constitution, providing that "No State shall ... pass ... any ... ex post facto law...". Although it is understood that this provision of the Constitution is usually narrowly construed to mean those laws which are "penal" in nature, such an interpretation of the subject Section of the Tax Code would, at the very least be "in the nature of" an ex post facto law. Such an interpretation would be "retrospective" and would result in the "impairment of obligations under contract" or would adversely affect a vested right (i.e., that of a municipality to continue collecting a valid tax). It seems to me that allowing a municipality to legally pass a tax, then subsequently holding the tax to be "illegal", or at least "not allowable", would be, in effect, having a law or rule which is in the nature of, or takes on the character of, an ex post facto law. *Bay v. Gage*, 36 Bard., NY 447.

In the scenario at hand, involving the City of Glen Rose, and the County of Somervell, the City (municipality) legally imposed the tax in 1996, because the County did not have a hotel occupancy tax in place at that time. The question, then, remains: "Does the legal imposition of the tax by a municipality become 'illegal' by virtue of the County subsequently imposing the tax (when the combined rate of state, county and municipality taxes exceeds 15%)?" In view of the language of Article I, Section 10 of the United States Constitution, it is my opinion that such an interpretation cannot stand. It would seem to me that a municipality should be given "priority" in the foregoing scenario, and that its act in passing a hotel occupancy tax within its extraterritorial jurisdiction, once

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proper and legal at the time of its institution, cannot be deemed "improper and illegal" afterward.

A second question which must, necessarily, arise out of this scenario is this: "Who (municipality or county) would be entitled to tax any future hotels which might come into existence within the municipality's extraterritorial jurisdiction, after the municipality has legally imposed the hotel occupancy tax on existing hotels?"

A "plain reading" of the provisions of V.T.C.A., Tax Code Section 351.0025(b) clearly seems to indicate that a county is to be given preference over a municipality in collecting the hotel occupancy tax within the extraterritorial jurisdiction of the municipality, but *only* if the county has already imposed the tax prior to the municipality. Taking into consideration the conclusion reached above involving Art. I, Section 10 of the United States Constitution, and since Somervell County has imposed the tax on hotels within its confines in 2005, it only seems logical that any future hotels, which might come into existence within the extraterritorial jurisdiction of the City of Glen Rose, could legally be taxed by the county, and, since the total rate charged by the state and the county would equal 13%, and the rate set by the City of Glen Rose is 7%, the City would be prohibited from collecting the tax from any new hotels within its extraterritorial jurisdiction, because of the 15% limit under Section 351.0025(b).

#### CONCLUSION

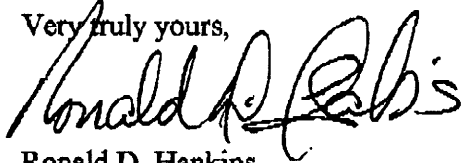
Once a municipality legally imposes a hotel occupancy tax on hotels located within its extraterritorial jurisdiction, pursuant to the provisions of V.T.C.A., Tax Code, Section 351.0025, the municipality cannot subsequently be forced to abandon collection of such tax, even though the county, in which the municipality is located, imposes a like tax. To hold otherwise would constitute a law that takes on the character of an ex post facto law, by adversely affecting a vested right of the municipality, and as such would violate the provisions of Art. I, Section 10, United States Constitution. Conversely, once a county legally imposes a hotel occupancy tax on hotels located within its jurisdiction, pursuant to the provisions of V.T.C.A., Tax Code, Section 352.002, a municipality within the county may not impose such a tax on any "new" hotels which may come into existence within the municipality's extraterritorial jurisdiction, if the imposition of such tax would violate the provisions of V.T.C.A., Tax Code, Section 351.0025(b), even though the municipality may be legally collecting the tax from existing hotels in the extraterritorial jurisdiction.

Should you require any further information concerning this matter, please feel free to contact me.

The Honorable Greg Abbott  
September 8, 2005

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Very truly yours,

A handwritten signature in black ink, appearing to read "Ronald D. Hankins". The signature is written in a cursive style with a large, prominent initial "R".

Ronald D. Hankins  
County Attorney  
Somervell County

VIA FAX to 512-472-6538