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HOUSE OF REPRESENTATIVES

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September 24, 1993

MBJ

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RO-621 I.D.# 22540

The Honorable Dan Morales
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RECEIVED
SEP 30 1993
LEGISLATIVE COMMITTEES

RE: Request for Opinion - Use of Hotel/Motel Occupancy Tax Revenue for Disabled Accessibility Adaptations in Historic Structures, and Historic Preservation for Private, For-Profit Entities

Dear Attorney General Morales:

On behalf of the City of Austin, we respectfully request an opinion from your office on the following questions:

Do any statutory or constitutional provisions prohibit the use of Hotel Occupancy tax revenue, collected under authority of Tex. Tax Code Section 351 et seq. (Vernon 1992 Supp.), to fund:

- A) architectural adaptations for disabled accessibility at sites or structures with Historic zoning, owned and operated by public or private non-profit entities which are open to the public, where such accessibility projects are not a part of historic preservation projects or directly related to the historic preservation of the site?; or
- B) historic preservation projects for sites or structures with Historic zoning, owned and/or operated by for-profit entities, which structures are open for business with the public?; or
- C) architectural adaptations for disabled accessibility at sites or structures with Historic zoning, owned and/or operated by private for-profit entities which are open for business with the public, where such accessibility projects are not a part of historic preservation projects or directly related to the historic preservation of the site?

Brief Facts:

The City of Austin has established a grants program which uses Hotel Occupancy tax revenue to fund historic restoration and preservation projects, pursuant to guidelines adopted by the Historic Landmark Commission. Grants have been limited to publicly owned sites which are zoned Historic, or sites owned by private non-profit entities which commit to maintain the sites open to public visitation for historical purposes. The City has not funded historic restoration or preservation projects at sites owned and operated by private for-profit entities.

Many Historic structures have limited access for the disabled, and it has been proposed that Hotel Occupancy tax funds be made available for projects which, in some cases, would consist solely of installing access for the disabled in Historic buildings open to the public. To the extent possible, the architectural adaptations for disabled accessibility would be designed and constructed in a manner and style consistent with the historic structure, even though they are obviously not a part of the "historic" architecture. Private owners of public accommodations are under a continuing obligation, under the ADA, to provide such access when structures are substantially reconstructed. The City provides tours of districts featuring historic structures, but the tours do not include entry into these buildings.

Discussion:

Municipal Hotel/Motel Occupancy Tax revenue may be used only for the purposes set out in Texas Tax Code Section 351-101, which provides in pertinent part:

- (a) Revenue from the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry, and that use is limited to the following:
 - ... (5) 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:
 - (A) at or in the immediate vicinity of convention center facilities; or
 - (B) located elsewhere in the municipality or its vicinity that would be frequented by tourists, convention delegates, or other visitors to the municipality.

- (b) Revenue derived from the [Hotel Occupancy tax] is to be expended in a manner directly enhancing and promoting tourism and the convention and hotel industry as permitted by subsection (a). That revenue may not be used for the general revenue purposes or general governmental operations of a municipality.

See Attorney General Opinions JM-965 (1988), and JM-690 (1987).

The Americans with Disabilities Act, Public Law 101-336 ("ADA"), prohibits discrimination by public entities on the basis of disability. Department of Justice regulations implementing the ADA, as it applies to state and local government services and programs, are located at 28 CFR Part 35.1

Private owners of public accommodations are under a continuing obligation to provide access for the disabled. 28 CFR 36.304. Accessibility improvements are not required until the owner undertakes substantial alterations to a building.

The ADA applies to public Historic preservation programs. Pertinent sections of the Department of Justice regulations implementing the ADA provide as follows:

28 CFR 33.149. Discrimination Prohibited.

Except as otherwise provided in 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

35.150 Existing Facilities.

- (a) A public entity shall operate each service, program, or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not-- ...
- (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property. ...

(b)(2) Historic preservation programs. In meeting the requirements of 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. ...

Places which are regularly open to the public are generally referred to as places of public accommodation. Providing accessibility for the disabled in places of public accommodation is also a public policy of the State of Texas. Art. 9201, Tex. Rev. Civ. Stat. Ann.

To the extent that the City is funding a historic preservation project or providing a program, the ADA requires that the City not "...limit a [disabled person] in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service." 28 CFR 35.130(b)(vii).

While the Act does not require any disabled accessibility feature that would threaten historic significance, in such a case, it would require alternative methods of providing the disabled with the benefits of a program. We interpret the ADA to require that where a public entity funds the historic restoration of a building with Hotel Occupancy tax revenue, that disabled accessibility would be required and could be funded through the Hotel Occupancy tax revenue as a part of the complete project. However, the question has not been resolved whether Hotel Occupancy tax funds could be used at a publicly owned historic site, or a historic site owned and operated by a private non-profit entity which is open to the public for historical viewing, to fund projects consisting solely of disabled accessibility adaptations where such alterations do not, in effect, amount to "historic" restoration or preservation.

When a historic "place of public accommodation" is owned by a private for-profit entity, it is not clear that Hotel Occupancy tax funds could be granted for historic preservation. Tex. Const. Art. III, Section 52; or further, solely to provide for handicapped accessibility. Tex. Tax Code 351.101, supra.

Art. III, Section 52 of the Texas Constitution prohibits the use of public funds for private purposes. Mike Willatt, Constitutional Restrictions On Use of Public Money and Public Credit, Texas Bar Journal, May 1975. The City is under no obligation to fund historical restoration or disabled accessibility architectural adaptations for structures which are privately owned and operated for profit. We ask whether the state constitutional and statutory provisions prohibit the use of Hotel Occupancy tax revenue to fund historic renovation and preservation projects in private for-profit sites open to the public, or further, to fund projects consisting entirely of disabled accessibility adaptations at such sites.

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We submit that, to the extent that Hotel Occupancy tax funds are used for disabled accessibility in historic buildings open to the public and promoted as tourist destinations by the City, such use of funds would further public policies expressed by (1) the ADA and state law, to remove architectural barriers in places of public accommodation, and (2) the Hotel Occupancy tax statutory provisions to attract tourists and convention delegates to visit preserved historic sites or museums, by increasing their accessibility to disabled tourists and conventioners. Such architectural adaptations could be termed an "activity" to increase historic site visitation, within the meaning of the Hotel occupancy tax statute. The ADA would prohibit the discrimination between disabled and non-disabled tourists and convention delegates. Accessibility furthers both federal and state statutory policies.

We look forward to your earliest possible review of these questions. If you have any questions regarding this request, please contact David Lloyd, Assistant City Attorney of Austin, at (512) 499-2509.

Cordially yours,



Wilhelmina Delco
State Representative