



ALAN WILSON
ATTORNEY GENERAL

February 07, 2017

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Dear Mr. Williams,

Attorney General Alan Wilson has referred your letter to the Opinions section regarding membership composition of an Accommodations Tax Advisory Committee and the purposes for which local accommodations tax revenue may be spent. Your letter describes the issues to be addressed as follows:

1. South Carolina Code of Laws § 6-4-25(A) prescribes how members should be chosen for the Advisory Committee. In the fourth sentence of this section, it states that "...members shall represent the geographic area where the majority of the revenue is derived." There is uncertainty as to the meaning of the term represent. Does this term absolutely require residency or does it mean that a member of the commission must represent the interests of that geographic area? If the latter, is it sufficient if a member of the commission has a business located in that geographic area?
2. In accordance with Title 6, Chapter 1, Article 5 of the South Carolina Code of Laws 1976, as amended, Berkeley County established an accommodations fee on February 26, 1996 by enactment of Ordinance 96-2-3. Section 5 of that ordinance requires accommodations fees "to be used for the support of tourism or tourist services in a manner that will best serve tourists from whom it was collected." Further, those fees "shall be spent by organizations domiciled in Berkeley County to attract tourists and benefit those tourists who seek accommodations in Berkeley County." There is uncertainty as to whether those funds may be expended for promoting tourism or tourist services which do not directly promote over-night stays at locations that collect accommodations fees subject to this ordinance. Said another way, must the accommodations fees only be expended on advertisement to promote over-night stays, or can those fees be used to promote tourism or tourist services which may have an effect on over-night stays?

Law/Analysis

1. **Does the phrase "represent the geographic area" in South Carolina Code of Laws § 6-4-25(A) absolutely require residency?**

In researching this opinion request, we have been unable to locate prior opinions issued by this Office or by our state courts interpreting the phrase "represent the geographic area" used in Section S.C. Code Ann. § 6-4-25(A). As a matter of first impression, we turn to the principles of statutory

interpretation to guide our analysis. The primary rule of statutory construction requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where the statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), reh'g denied (Aug. 5, 2015). With these principles in mind, we turn to the text of South Carolina Code of Laws Section 6-4-25(A) which states the following:

(A) A municipality or county receiving more than fifty thousand dollars in revenue from the accommodations tax in county areas collecting more than fifty thousand dollars shall appoint an advisory committee to make recommendations on the expenditure of revenue generated from the accommodations tax. The advisory committee consists of seven members with a majority being selected from the hospitality industry of the municipality or county receiving the revenue. At least two of the hospitality industry members must be from the lodging industry where applicable. One member shall represent the cultural organizations of the municipality or county receiving the revenue. For county advisory committees, members shall represent the geographic area where the majority of the revenue is derived. However, if a county which receives more in distributions of accommodations taxes than it collects in accommodations taxes, the membership of its advisory committee must be representative of all areas of the county with a majority of the membership coming from no one area.

S.C. Code Ann. § 6-4-25 (emphasis added).

The statute lists several requirements for composing such an advisory committee.¹ Of the seven advisory committee members, the majority are to be selected from the hospitality industry with "hospitality" being a defined term applicable to those members who are "directly involved in the service segment of the travel and tourism industry including, but not limited to, businesses that primarily serve visitors such as lodging facilities, restaurants, attractions, recreational amenities, transportation facilities and services, and travel information and promotion entities." S.C. Code Ann. § 6-4-5(3). Of the committee members selected from the hospitality industry, there is a mandatory requirement that two such members be from the lodging industry, but only where applicable. S.C. Code Ann. § 6-4-25. Further, one committee member must "represent the cultural organizations" with "cultural" being a defined term applicable to those members who "are actively involved and familiar with the cultural community of the area including, but not limited to, the arts, historical preservation, museums, and

¹ The South Carolina Constitution lists among the eligibility requirements for office that "[n]o person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector..." S.C. Const. Art. VI, § 1. Likewise, S.C. Const. Art. XVII, § 1 states that "[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector..." The South Carolina Supreme Court has interpreted these provisions to imply a residency requirement within the political subdivision an officer represents even when one is not specified by the General Assembly. McLure v. McElroy, 211 S.C. 106, 120, 44 S.E.2d 101, 108 (1947), overruled on other grounds by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997). However, this Office has previously opined that members of accommodations tax committees are not officers. Op. S.C. Atty. Gen., 2001 WL 1215465 (September 14, 2001) (opining members of the Horry County Accommodations Tax Committee are not considered officers for dual office holding purposes).

festivals.” S.C. Code Ann. § 6-4-5(2). Finally, the statute presents geographic requirements for committee members which apply in alternative situations. The first is the default requirement that “members shall represent the geographic area where the majority of the revenue is derived.” S.C. Code Ann. § 6-4-25. The second applies when “a county... receives more in distributions of accommodations taxes than it collects in accommodations taxes.” *Id.* In such a case the advisory committee membership “must be representative of all areas of the county with a majority of the membership coming from no one area.”

Based on the plain meaning of the statute and the context of the composition requirements, it is this Office’s opinion that the phrase “represent the geographic area where the majority of the revenue is derived” in Section 6-4-25 does not express a residency requirement for members of an accommodations tax advisory committee. As discussed above, Section 6-4-25 uses the word “represent” or “representative” to describe three separate requirements for advisory committee composition. It is first used in the phrase “represent the cultural organizations.” Black’s Law Dictionary defines “representative” as “[s]omeone who stands for or acts on behalf of another.” REPRESENTATIVE, Black’s Law Dictionary (10th ed. 2014). Additionally, the American Heritage College Dictionary defines “represent” to mean “to serve as the official and authorized delegate or agent for” or “to act as a spokesperson for.” American Heritage College Dictionary 1158 (3d. ed. 1993). As expressed in Section 6-4-25, it is clear that “represent the cultural organizations” does not express a residency requirement for members of an accommodations tax advisory committee. Again, “cultural” is defined statutorily in Section 6-4-5 to require that the member who “represents” these organizations must be “actively involved and familiar with” their concerns. Based on this definition, the usage of the term “represent” suggests that the advisory committee member would be a spokesperson or advocate for concerns of cultural organizations within the jurisdiction of the political subdivision of the State receiving accommodations tax revenue.

The second and third use of “represent” or “representative” applies more broadly to all members of the advisory committee. The second use of “represent” requires members to “represent the geographic area where the majority of the revenue is derived.” “Geographic area” is an undefined term which does not express clear parameters for an easily enforceable residency requirement. A 1988 Texas Attorney General opinion interpreted whether an amendment to Tex. Water Code Ann. § 5.052 imposed a residency requirement where it stated that members of the Texas Water Commission are to be appointed “in such a manner that each member is from a different section of the state.” Tex. Att’y Gen. Op. JM-877 (1988). The Texas Attorney General opined that the “use of the undefined term ‘section’ had the effect of destroying a mandatory residency requirement.... [A Section] is a geographical area, but one so indefinite in location and extent that it cannot be the basis of an enforceable residency requirement or other method of ensuring geographical distribution. A provision that is essentially indefinite, uncertain, and vague is ineffective and void.” *Id.* Section 6-4-25 suffers similarly from the vague term “geographic area” and is complicated by the further description “where the majority of the revenue is derived.” It is likewise this Office’s opinion that the phrase “represent the geographic area” in Section 6-4-25 is indefinite and does not impose an enforceable residency requirement. The scale of the geographic area would influence which area is determined to derive a majority of revenue; e.g., whether geographic area is determined based on zoning, voting precinct, political subdivision, or other metric. However, this Office does not find that the requirement is void, but rather that it can be construed as an expression of the Legislature’s guidance that the appointing authority give consideration to whether members on the advisory committee will represent the interests of those industries and areas where the revenues derive.

The third and final use of “representative” requires that “the membership of its advisory committee must be representative of all areas of the county.” This Office does not interpret this phrase to require residency. A 1992 Ohio Attorney General opinion interpreted a similar statute to determine “whether a physician who does not reside within the geographic boundaries of the general health district, but does operate a private practice within the district, can be appointed to serve on the district board of health by the district advisory council.” 1992 Ohio Op. Att’y Gen. 2-43 (1992). Ohio Rev. Code Ann. § 3709.03(B) (West) established requirements for appointing members to a health district advisory council including that such “[a]ppointments shall be made with due regard to equal representation of all parts of the district.” The Ohio Attorney General’s opinion stated as follows:

As a general matter, the concept of representation does not, in and of itself, require that a representative be a resident of the geographic area being represented.

...

The apparent purpose of R.C. 3709.03(B) is to insure that the general health district board, in the aggregate, is composed of persons qualified to bring the concerns of the entire district before the board and to give balanced consideration to the needs of all parts of the district. Viewed in this light, a physician who operates a private practice within the district, but does not reside therein, may be as qualified to represent the district or part of the district in which that individual works as a physician who does reside there.

1992 Ohio Op. Att’y Gen. 2-43 (1992). The wording of Section 6-4-25 suggests a similar purpose for the advisory committee members. Namely that, in conjunction with the requirements that members representing hospitality industry, lodging industry, and cultural organizations, the advisory committee members are required to be qualified to represent the interest of those in the areas where the accommodations tax revenue is derived. As the Ohio Attorney General’s opinion concluded above, it is this Office’s opinion that Section 6-4-25 does not require residency for membership on the advisory committee, but rather that members who have ownership or experience in the industries within the political subdivision which benefit from the accommodations tax revenue are sufficient to comply with the representation requirements in Section 6-4-25.

2. For what purposes may local accommodations tax revenue be spent, and does Berkeley County Ordinance 96-2-3, § 5 restrict those purposes solely to promotion of over-night stays?

Your letter states that Berkeley County established a local accommodations tax by ordinance in accordance with S.C. Code Ann. § 6-1-520. Your letter requests this Office’s opinion as to whether the funds collected by the local accommodations tax must be spent on advertisement to promote over-night stays or more broadly to promote tourism or tourist services which may have an effect on overnight stays. The General Assembly provided the purposes for which revenue generated by a local accommodations tax may be used by statute. Section 6-1-530 states the following:

(A) The revenue generated by the local accommodations tax must be used exclusively for the following purposes:

- (1) tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums;
- (2) tourism-related cultural, recreational, or historic facilities;
- (3) beach access, renourishment, or other tourism-related lands and water access;
- (4) highways, roads, streets, and bridges providing access to tourist destinations;
- (5) advertisements and promotions related to tourism development; or
- (6) water and sewer infrastructure to serve tourism-related demand.

(B)(1) In a county in which at least nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, the revenues of the local accommodations tax authorized in this article may also be used for the operation and maintenance of those items provided in (A)(1) through (6) including police, fire protection, emergency medical services, and emergency-preparedness operations directly attendant to those facilities.

(2) In a county in which less than nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, an amount not to exceed fifty percent of the revenue in the preceding fiscal year of the local accommodations tax authorized pursuant to this article may be used for the additional purposes provided in item (1) of this subsection.

S.C. Code Ann. § 6-1-530 (Supp. 2016). As provided by Section 6-1-530, local accommodations tax revenue may be used for any of the purposes listed under subsection (A) and as directed under subsection (B)(1) or (B)(2) based on whether a county collects an accommodations tax threshold of nine hundred thousand dollars pursuant to Section 12-36-920. See Florence Cty., Petitioner, 04-ALJ-30-0086-CC, 2004 WL 3154879, at *6-8 (June 25, 2004); Op. S.C. Atty. Gen., 2000 WL 1803611 (September 28, 2000) (opining that funding a magistrates position is not a proper expenditure of the Florence County local accommodations tax revenues).

Your letter raises the question of whether Berkeley County Ordinance 96-2-3, § 5 (“Ordinance”) further restricts the use of local accommodations tax revenues such that they can only be spent on advertising to promote over-night stays in Berkeley County. Section 5 reads as follows:

Section 5- Distribution of Funds

Berkeley County Council shall, upon the annual recommendation of the Berkeley County Accommodations Tax Advisory Committee, distribute the accommodations fees collected and placed in the “Berkeley County Accommodations Fee Special Reserve Fund” to be used for the support of tourism or tourist services in a manner that will best serve tourists from whom it was collected. It shall be the responsibility of the Berkeley County Council to ensure that any and all money expended from the “Berkeley County Accommodations Fee Special Reserve Fund” shall be spent by organizations domiciled in Berkeley County to attract tourists and benefit those tourists who seek accommodations in Berkeley County.

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Berkeley County Ordinance 96-2-3, § 5. By its express terms, Section 5 does not restrict the use of revenue from the local accommodations taxes solely to the purchase of advertisements. In the last sentence of Section 5, the Ordinance requires revenues to be spent “to attract tourists and benefit those tourists who seek accommodations in Berkeley County.” While a court would likely interpret the phrase “attract tourists” to include advertising, this is clearly not the exclusive use of those funds due to the conjunction “and.” In addition to attracting tourists, it is permissible to use the funds for the “benefit those tourists who seek accommodations in Berkeley County.” While this phrase is undefined, we find no statement of the Berkeley County Council’s legislative intent to further limit the permissible purposes listed by the General Assembly in Section 6-1-530. Therefore, it is this Office’s opinion that the purposes authorized by the Ordinance for the expenditure of Berkeley County’s local accommodations tax revenue are coextensive with the purposes listed in Section 6-1-530.

Conclusion

We hope the guidance provided above will assist you and the Berkeley County council in its selection of members to serve on its accommodations tax advisory committee and in determining how best to allocate its local accommodations tax revenues. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General