

ALAN WILSON
ATTORNEY GENERAL

May 31, 2022

Edward W. Riggs, Sr.
Chairman
Tourism Expenditure Review Committee
986 Scotland Drive
Mount Pleasant, SC 29464

Dear Mr. Riggs:

You have requested an opinion from this Office regarding whether a municipality or county can create a nonprofit organization pursuant to section 6-4-10(3) of the South Carolina Code of Laws without determining if there is an existing organization that has, or is capable of developing, an effective tourism promotion program. You inform us that a local government wants to replace the visitor and convention bureau that has been managing and directing the expenditure of its local accommodations taxes for tourism promotion.

LAW/ANALYSIS

To provide some background:

Pursuant to S.C. Code Ann. § 12-36-920(A) (Revised 2000), a sales tax of seven percent is imposed by the state on accommodations provided to transients in South Carolina. One component of that tax is a two percent "local" accommodations tax which, pursuant to S.C. Code Ann. § 12-36-2630(3) (Supp. 2003), must be credited to cities and counties in accordance with S.C. Code Ann. §§ 6-4-5, *et seq.* (Revised 2004).

Florence County v. Tourism Expenditure Review Committee, No. 04-ALJ-30-0086-CC, 2004 WL 3154879 (June 25, 2004).

Municipalities and counties who have collected more than \$50,000.00 in local accommodations taxes must allocate the tax revenue in the manner provided by section 6-4-10:

The funds received by a municipality or a county in county areas collecting more than fifty thousand dollars from the local

accommodations tax provided in Section 12-36-2630(3) must be allocated in the following manner:

(1) The first twenty-five thousand dollars must be allocated to the general fund of the municipality or county and is exempt from all other requirements of this chapter.

(2) Five percent of the balance must be allocated to the general fund of the municipality or county and is exempt from all other requirements of this chapter.

(3) Thirty percent of the balance must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program. If no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality or county shall distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them. Fees allocated pursuant to this subsection must not be used to pledge as security for bonds and to retire bonds. Also, fees allocated pursuant to this subsection must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity, and not used to pledge as security for bonds and to retire bonds.

(4)(a) The remaining balance plus earned interest received by a municipality or county must be allocated to a special fund and used

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for tourism-related expenditures. This section does not prohibit a municipality or county from using accommodations tax general fund revenues for tourism-related expenditures . . .

S.C. Code Ann. § 6-4-10 (1976 Code, as amended).

We must rely on the rules of statutory construction in order to construe section 6-4-10(3). The most important rule is to determine legislative intent:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n., 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The portion of section 6-4-10(3) that is pertinent to your question provides:

To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program. If no organization exists, the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality

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or county shall distribute the tourism promotion funds to the organizations selected or created to receive them.

S.C. Code Ann. § 6-4-10(3) (emphasis added).

Section 6-4-10(3) expressly states that a municipality or county “shall select” one or more tourism promotion organizations. “Under general principles of statutory construction, the word ‘shall’ is interpreted as mandatory rather than permissive.” Op. S.C. Atty. Gen., 1980 WL 120615 (Jan. 21, 1980) (citing 2A Sutherland Statutory Construction § 57.03 (1973)). The word “select” means “to choose in preference to another or others; pick out” and “chosen from a number or group by fitness or preference.” See Merriam-Webster at www.merriam-webster.com/dictionary/select; Dictionary.Com at www.dictionary.com/browse/select; and Collins Dictionary at www.collinsdictionary.com/us/dictionary/english/select.

Section 6-4-10(3) provides for the selection of an organization that has an “existing, ongoing tourist promotion program.” It also plainly states that “if no organization exists, the municipality or county shall create an organization.” Id.

Based on this language, it is clear that the Legislature intended for a municipality or county to choose an existing organization that meets the eligibility requirements of the statute to manage and direct the expenditure of its tourism promotion funds. A local government is only authorized to create an organization when one does not already exist. Therefore, a municipality or county must determine whether an eligible¹ organization exists before creating a new one.

Section 6-4-10(3) does not expressly provide for replacement of a tourism promotion organization. However, “the power to remove one so employed or appointed is generally incidental to the power to appoint.” Op. S.C. Atty. Gen., 1984 WL 159941 (Nov. 26, 1984). The same procedure applies when replacing a tourism promotion organization.

Your letter states that TERC’s [Tourism Expenditure Review Committee’s] authority is limited to acting upon the annual reports and complaints provided for in section 6-4-35(B)(1) and (2) and that it cannot employ other methods to ascertain whether an expenditure of local accommodations taxes complies with the Accommodations Tax statutes. See Conclusion, footnote 2. You cite Tourism Expenditure Rev. Comm. v. City of Myrtle Beach, 403 S.C. 76, 742 S.E.2d 371 (2013) for this proposition. We must therefore address TERC’s authority.

Section 6-4-35(B) provides:

(B)(1)(a) The Tourism Expenditure Review Committee shall serve as the oversight authority on all questionable tourism-related

¹ Whether an organization is eligible is a fact-specific issue that must be answered by a court and not by this Office. See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) (“[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.”)

expenditures and to that end, all reports filed pursuant to Section 6-4-25(D)(3) must be forwarded to the committee for review to determine if they are in compliance with this chapter. The municipality or county must be notified if an expenditure is questioned, and the committee may consider any further supporting information the municipality or county may provide. If the committee finds an expenditure to be in noncompliance, it shall certify the noncompliance to the State Treasurer, who shall withhold the amount of the expenditure found in noncompliance from subsequent distributions in accommodations tax revenue otherwise due the municipality or county. An appeal from an action of the committee under this subitem lies with the Administrative Law Judge Division.

(b) If the committee determines that a municipality or county has failed to file the reports required pursuant to Section 6-4-25(D)(3), it may impose a fee of five hundred dollars a month or part of a month for each month the report is not filed, but not more than five thousand dollars. The committee shall certify the penalty to the State Treasurer, who shall withhold the amount of the penalty from subsequent distributions otherwise due the municipality or county. An appeal from an action of the committee under this subitem lies with the Administrative Law Judge Division.

(c) Allocations withheld must be reallocated proportionately to all other recipients.

(2) The committee has jurisdiction to investigate and research facts on written complaints submitted to it with regard to the appropriate tourism-related expenditures and resolve these complaints as provided in item (1) of this subsection.

(3) The committee shall forward copies of information submitted by the local governments and regional tourism agencies pursuant to Section 6-4-25 arising under the tourism provisions of this chapter to the Department of Parks, Recreation and Tourism, which shall publish an annual report on the information submitted.

S.C. Code Ann. § 6-4-35(B) (1976 Code, as amended) (emphasis added).

Because of the provision in section 6-4-35(B) stating that TERC “shall serve as the oversight authority on all questionable tourism-related expenditures,” TERC is granted broad authority to

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prevent unauthorized expenditures. Section 6-4-35(B) provides two methods for finding unauthorized expenditures, reviewing annual expenditure reports and investigating complaints.² While the Legislature gave TERC the specific authority to review annual reports and investigate complaints, we do not believe this specific authority limits TERC's general authority to oversee any questionable tourism-related expenditures. In our opinion, TERC is required to act whenever it becomes aware of expenditures that are not compliant with the Accommodations Tax statutes, S.C. Code Ann. § 6-4-5 et seq (1976 Code, as amended).

CONCLUSION

In our opinion, the Legislature intended by section 6-4-10(3) for a municipality or county to choose an existing organization that meets the statutory eligibility requirements to manage and direct the expenditure of its tourism promotion funds. A local government is only authorized to create an organization when one does not already exist. Therefore, a municipality or county must determine whether an eligible organization exists before creating a new one pursuant to section 6-4-10(3). We recognize that whether an organization is eligible is a fact-specific issue that must be answered by a court and not by this Office. See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) (“[b] ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.”)

We also believe that the Tourism Expenditure Review Committee has broad authority to act whenever it becomes aware of expenditures that are not compliant with the Accommodations Tax statutes, S.C. Code Ann. § 6-4-5 et seq (1976 Code, as amended). It is not limited to acting upon the annual expenditure reports and the complaints provided for in section 6-4-35(B)(1) and (2).

Sincerely,

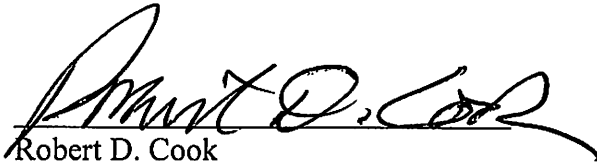


Elinor V. Lister
Assistant Attorney General

² The court, in Tourism Expenditure Rev. Comm. v. City of Myrtle Beach, 403 S.C. 76, 742 S.E.2d 371, explained that the Legislature also established an exclusive procedure for TERC to challenge expenditures of local accommodations taxes in section 6-4-35.

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline that extends to the right.

Robert D. Cook
Solicitor General