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ATTORNEY GENERAL OF WASHINGTON

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August 17, 2016

The Honorable Gregory M. Banks
Island County Prosecuting Attorney
PO Box 5000
Coupeville, WA 98239

Dear Prosecutor Banks:

By letter previously acknowledged, you have requested an opinion on the following question:

When awarding lodging tax revenues pursuant to RCW 67.28.1816(2)(b)(ii), may a municipality award an amount to a recipient that is different from the amount on the list of candidates and recommended amounts provided by the local lodging tax advisory committee?

BRIEF ANSWER

When awarding lodging tax revenues pursuant to RCW 67.28.1816(2)(b)(ii), a municipality may award amounts different from the local lodging tax advisory committee's recommended amounts, but only after satisfying the procedural requirements of RCW 67.28.1817(2), according to which the municipality must submit its proposed change to the advisory committee for review and comment at least forty-five days before final action on the proposal.

BACKGROUND

The lodging tax is a special excise tax on charges for lodging. RCW 67.28.180. The legislature has authorized cities and counties to impose a tax of up to two percent on the cost of lodging in the jurisdiction. RCW 67.28.180(1); *see also* RCW 67.28.181. The tax, and the use to which it may be put, have evolved from its origins as a limited authorization to pay for stadium facilities when first enacted in 1967 into broad authority to finance tourism-related facilities and services. *See* AGO 2006 No. 4, at 2-3 (recounting the history of the lodging tax to that point).

Revenues from lodging tax are deposited into a special fund in the municipal treasury, and "used solely for the purpose of paying all or any part of the cost of tourism promotion, acquisition of tourism-related facilities, or operation of tourism-related facilities." RCW 67.28.1815. The law then allows local governments to use revenues for tourism marketing and for the operations and capital expenditures of tourism-related

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facilities. RCW 67.28.1816(1). This includes both direct use of the revenue by the municipality, but also use of the revenues indirectly “through a convention and visitors bureau or destination marketing organization[.]” RCW 67.28.1816(1).

In 1997, the legislature authorized the creation of local lodging tax advisory committees and imposed procedural requirements related to such advisory committees. *See* Laws of 1997, ch. 452, § 5. The purpose of these advisory committees is to review and comment on any new lodging tax, increase in the rate, repeal of an exemption, or change in use of lodging tax revenue that is proposed by a municipality of 5,000 or more in population. RCW 67.28.1817. As adopted in 1997, a municipality of 5,000 or more must submit its proposal to the local lodging tax advisory committee for review and comment before making any change to the use of revenue from the lodging tax. RCW 67.28.1817(2).

Thus, as written in 1997, the role of the advisory committee was to review and comment, and facilitate public review and comment on use of the revenue.

In 2013, the legislature amended RCW 67.28.1816 and expanded the role of the local lodging tax advisory committee. Now, in municipalities of 5,000 or more, applicants for use of lodging tax revenues must submit their applications directly to the advisory committee. Those applications must include estimates of how their proposed use of these funds will increase tourism. RCW 67.28.1816(2)(a)(i)-(iii) (describing required estimates), .1816(2)(b)(i) (directing that applications and estimates are to be submitted to the local advisory committee).

As amended, RCW 67.28.1816(2)(b)(ii) now reads:

The local lodging tax advisory committee must select the candidates from amongst the applicants applying for use of revenues in this chapter and provide a list of such candidates and recommended amounts of funding to the municipality for final determination. The municipality may choose only recipients from the list of candidates and recommended amounts provided by the local lodging tax advisory committee.

Under that statute, the advisory committee’s task is to “select the candidates from amongst the applicants applying for use of revenues” and “provide a list of such candidates and recommended amounts of funding to the municipality for final determination.” RCW 67.28.1816(2)(b)(ii). The municipality “may choose only recipients from the list of candidates and recommended amounts provided by the local lodging tax advisory committee.” RCW 67.28.1816(2)(b)(ii).

The next statute in succession within the Code, immediately following RCW 67.28.1816, provides the method through which a municipality may change the use of lodging tax revenue:

Any municipality that proposes imposition of a tax under this chapter, an increase in the rate of a tax imposed under this chapter, repeal of an exemption

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from a tax imposed under this chapter, or a change in the use of revenue received under this chapter shall submit the proposal to the lodging tax advisory committee for review and comment. The submission shall occur at least forty-five days before final action on or passage of the proposal by the municipality. The advisory committee shall submit comments on the proposal in a timely manner through generally applicable public comment procedures. The comments shall include an analysis of the extent to which the proposal will accommodate activities for tourists or increase tourism, and the extent to which the proposal will affect the long-term stability of the fund created under RCW 67.28.1815. Failure of the advisory committee to submit comments before final action on or passage of the proposal shall not prevent the municipality from acting on the proposal. A municipality is not required to submit an amended proposal to an advisory committee under this section.

RCW 67.28.1817(2).

ANALYSIS

You ask whether a municipality reviewing the list of candidates and recommended amounts from the lodging tax advisory committee is free under RCW 67.28.1816(2)(b)(ii) to award an amount that is different from the amount recommended by the advisory committee. I conclude that yes, the municipality is free to do so, but only if the municipality first seeks further input from the advisory committee by following the procedural requirements of RCW 67.28.1817(2).

The primary objective of statutory construction is to give effect to the legislature's intent. *Tesoro Refining & Mktg. Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). This is done by first looking to the language of the statute itself, including the statutory scheme as a whole. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The statutes are clear in some respects. The final authority to determine the distribution of lodging tax revenues is clearly vested in the municipality¹ and not in the advisory committee. RCW 67.28.1816(2)(b)(ii) (providing that the committee must submit its recommendations "to the municipality for final determination"). The committee is "advisory" in nature, and its work product is "a list of such candidates and recommended amounts of funding to the municipality for final determination." RCW 67.28.1816(2)(b)(ii). But while the municipality has the final say in distributing revenues, the statute is also clear that it cannot choose recipients for the revenues that were not recommended by the advisory committee. The word "recommended" modifies "amounts" but not "candidates." RCW 67.28.1816(2)(b)(ii). "[O]nly recipients from the list of

¹ A "municipality" for purposes of the lodging tax means a city or county. RCW 67.28.080(2). Final decision making authority for cities is generally vested in the city council (*see, e.g.*, RCW 35A.11.020 (noncharter code cities)), while for a county that authority is vested in the county commissioners (RCW 36.32.120).

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candidates and recommended amounts” may receive distributions of lodging tax revenue from the municipality. RCW 67.28.1816(2)(b)(ii). (emphases added). And the municipality is allowed to “choose *only recipients*” from the list. RCW 67.28.1816(2)(b)(ii) (emphasis added).

While these elements of the statute are clear, one crucial element is debatable and prompts your question. You note that there are at least two plausible interpretations of the directive that “[t]he municipality may choose only recipients from the list of candidates and recommended amounts provided by the local lodging tax advisory committee.” RCW 67.28.1816(2)(b)(ii). The first possible reading is that the municipality “may choose only recipients from the” committee’s list, but is free to vary the “recommended amount.” For example, if the committee recommended that Applicant A receive \$5,000 and Applicant B receive \$2,000, the municipality could award Applicant A \$7,000 and Applicant B \$1,000, or any other amount the municipality thought appropriate. The second possible reading is that the municipality may choose “only recipients from the list of candidates” and can give them only the “recommended amounts” or nothing at all. For example, if the committee recommended that Applicant A receive \$5,000 and Applicant B receive \$2,000, the municipality could award Applicant A \$5,000 and Applicant B nothing, but could not give either applicant any money in an amount different from the committee’s recommendation.² I agree that both of these readings are plausible, and commenters supported each view. That said, each reading suffers from significant flaws, and I ultimately believe that a third possible interpretation best comports with the legislative intent.

The problem with the first reading of the statute is that it prevents the advisory committee from serving one of its statutory roles. Under RCW 67.28.1817(2), the committee is to advise the municipality of the extent to which a change in the use of lodging tax revenue “will accommodate activities for tourists or increase tourism, and the extent to which the proposal will affect the long-term stability of the fund[.]”³ To the extent the municipality is free to disregard the recommendations of the committee, the committee will be unable to perform this function because it will lack an opportunity to comment on the change in the use of funds. For example, if the committee recommends that Applicant A receive \$5,000 and Applicant B receive \$2,000, the

² To be clear, under neither reading could the municipality grant any money to Applicant X, who the committee did not recommend receive anything.

³ One might argue that a municipality altering the amounts recommended by the advisory committee under RCW 67.28.1816(2)(b)(ii) does not qualify as “a change in the use of revenue received under this chapter” under RCW 67.28.1817, but at least three factors suggest that it does qualify. First, RCW 67.28.1816(2) repeatedly refers to “applicants applying for use of revenues in this chapter,” RCW 67.28.1816(2)(a), (b)(i), (b)(ii), almost the same language used in RCW 67.28.1817, which suggests that the legislature did consider such use covered. Second, in adopting the language now codified in RCW 67.28.1816 about the advisory committee’s role, the legislature first considered placing that language in RCW 67.28.1817. *See* Engrossed Substitute H.B. 1253, § 4, 63d Leg., Reg. Sess. (Wash. 2013). This suggests that the legislature was considering the statutes together and the interplay between them. Finally, if such changes were not covered, the municipality could dramatically change use of lodging tax revenue (by substantially increasing the awards to recipients on the list) without any input from the advisory committee, which seems quite contrary to the legislative intent behind RCW 67.28.1817.

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municipality could award Applicant A \$1,000 and Applicant B \$50,000 without the committee having an opportunity to address how those amounts will affect the stability of the lodging tax fund or “will accommodate activities for tourists or increase tourism.”

Meanwhile, the problem with the second reading of the statute is that it gives short shrift to the legislature’s repeated indications that the committee’s role is advisory and that the amounts it suggests are “recommended.” RCW 67.28.1816(2)(b)(ii). If the legislature really intended to give the municipality no choice but to approve precisely the amounts recommended by the committee or award nothing to a recipient at all, it certainly could have made that intent far clearer, and the use of “recommended amounts” would seem quite convoluted.

For these reasons, I conclude that a third plausible reading of the statute best effectuates the legislative intent. The statute immediately following RCW 67.28.1816 provides a mechanism by which the municipality can change the use of lodging tax funds. Under RCW 67.28.1817(2), “[a]ny municipality that proposes . . . a change in the use of revenue received under this chapter shall submit the proposal to the lodging tax advisory committee for review and comment.” Reading the two statutes together, I conclude that the municipality is initially bound to make “take it or leave it” selections both as to the recipients of lodging tax revenue and the amounts; but, if the municipality wishes to change the amounts, it has an avenue for doing so. It may do so only by following the procedure specified in RCW 67.28.1817(2) for seeking input from the advisory committee. Failing to follow that procedure, the municipality would be making a change in the use of revenue without input from the advisory committee, contrary to the requirement of RCW 67.28.1817(2). Therefore, a municipality wishing to award a non-recommended amount may do so, but only in accordance with the procedural steps at RCW 67.28.1817(2). It must submit its proposal for the different use of the lodging tax revenues to the local lodging tax advisory committee for review and comment at least forty-five days before final action on the proposal. RCW 67.28.1817(2). So, for example, if the committee recommended that Applicant A receive \$5,000 and Applicant B receive \$2,000, the municipality could instead propose that Applicant A receive \$10,000 and Applicant B receive \$1,000 (or any other amounts), but would have to give the advisory committee 45 days to comment on that proposal before adopting it. Construing the statutes this way preserves the role of the advisory committee by allowing it to advise while also preserving the role of the municipality as the final decision maker. RCW 67.28.1816(2)(b)(ii).

To the extent this result might not be clear from the statutory language alone, legislative history is helpful. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-06, 268 P.3d 892 (2011) (if the statutory language is susceptible of more than one meaning, courts “look to the legislative history of the statute and the circumstances surrounding its enactment” (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003))). Reviewing sequential drafts of the legislation through which the legislature amended RCW 67.28.1816 in 2013 is helpful. See *Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006) (looking to sequential drafts to discern legislative intent). The original form of the bill did not include the addition of the language that became paragraph (2)(b)(ii) of RCW 67.28.1816. H.B. 1253, 63d

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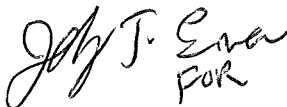
Leg., Reg. Sess. (Wash. 2013).⁴ Before passage, the House amended the bill to add language to RCW 67.28.1817, providing: “The legislative body of the municipality may *only choose* recipients from the prioritized list of applications and funding levels provided by the local lodging tax advisory committee.” Engrossed Substitute H.B. 1253, 63d Leg., Reg. Sess. (Wash. 2013) (emphasis added, showing different placement of the word “only”). But before final passage, the legislature removed the proposed amendment to RCW 67.28.1817 from the bill and settled upon the current language that now appears in RCW 67.28.1816(2)(b)(ii). Laws of 2013, ch. 196, § 1. The grammatical significance of this history is that the municipality’s choice is directed to selecting recipients from among those on the advisory committee’s list, authorizing no other choice. This means that, at least as an initial proposition, when the municipality selects a recipient it also selects the amount. The municipality can change that amount, but only by following the procedure of RCW 67.28.1817(2).

If the legislature’s intent had been to simply limit the municipality’s choice of recipients, while allowing unfettered discretion as to the amounts allocated to each, the legislature could have simply said so. Instead, it enacted RCW 67.28.1816(2)(b)(ii) alongside the already existing mechanism for changing use of the revenue in RCW 67.28.1817(2). In doing so, the legislature maintained the role of the committee as an advisory body that makes recommendations, while also vesting final decision making authority in the municipality.

All of that said, as I have noted above, this statute is susceptible of competing plausible interpretations. While I believe that the reading I offer here best effectuates the legislative intent, this is certainly a statute that could benefit from clarification as to its intended meaning.

I trust that the foregoing will be useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

Handwritten signature of H. Lee Overton in cursive, with the initials "FOR" written below it.

H. LEE OVERTON
Assistant Attorney General
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⁴ All of the sequential drafts of H.B. 1253 are available online on the legislature’s web site at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1253&year=2013>.