

**MEMORANDUM  
ATTORNEY CLIENT COMMUNICATION**

TO: Leana Kinley  
FROM: Robert C. Muth, City Attorney  
DATE: June 26, 2024  
RE: Use of TAC funds for Courthouse Plaza Project (“the Project”)

Leana – I am providing you with the following legal memorandum associated with the issue raised regarding the use of lodging tax funds (“TAC”) funds (restricted monies) on the Project.

First, as the City Attorney and a former council member, I personally do not take any position on the Project one way or the other.

Second, while I have not personally reviewed the prior communication and audit issues associated with the Project, my assumption in this analysis is the auditor’s office has previously approved the use of restricted funds on this Project.

By way of a short background, the TAC funds – include both the “basic” and “additional” lodging taxes – must generally be used for tourism promotion, **acquisition of tourism-related facilities, or operation of tourism-related facilities.** RCW 67.28.1815-.1816. The statute allows for the following, non-exhaustive use of TAC funds:

- Tourism marketing
- Marketing and operations of special events and festivals designed to attract tourists
- Operations *and* capital expenditures of tourism-related facilities owned or operated by a municipality or a public facilities district, including repayment of general obligation bonds (RCW 67.28.150) or revenue bonds (RCW 67.28.160) for eligible capital projects
- Operations of tourism-related facilities owned or operated by nonprofit organizations (but *not* capital expenditures)

Definitions of “tourism,” “tourism promotion,” and “tourism-related facility” are provided in RCW 67.28.080. Cities and counties may use the funds directly or indirectly through a convention and visitors bureau or destination marketing organization. The funds may be awarded to cities or counties for eligible expenses, nonprofits, or tourism organizations.

The Auditor’s office will require the City to be deemed an applicant for the allocation of any TAC funds and require the same approval process. RCW 67.28.1816(2)(b)(ii) states: “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.” Again, the guiding principle is the Project should be used by tourists; however, each situation is unique and requires assessment.

The Attorney General's office, after conferring with the State Auditor's Office, has concluded lodging tax revenues may be used to pay for staff support of the lodging tax advisory committee, provided there is a proper application, and the required reporting requirements are followed. The Attorney General's conclusion comes from RCW 67.28.1815, which states the revenues must be used "solely for the purpose of paying all or any part of the cost of tourism promotion..."

The City will need to justify with objective as well as subjective data the Project will promote tourism in Stevenson. RCW 67.28.080(6) defines "tourism promotion" as activities, operations, and expenditures designed to increase tourism. There is not a definitive list of the kinds of projects which may promote tourism. The non-exhaustive list does mention funding the marketing or operation of special events and festivals. In my interpretation this would include facilities to host these kinds of special events and festivals.

RCW 67.28.080(7) further defines a "tourism-related facility" to include real property with a usable life of three or more years – owned by a public entity (does not require the City to be the real property owner), thus the lease with the County would satisfy the "ownership by a public entity" requirement. The facility must be used to support tourism, performing arts, or to promote tourist activities – thus the use of the Project is not limited to a specific purpose. Obviously, if any reason for the Project is to support tourism or accommodate tourist activities, the Project would meet the definition. The use of the Project for concerts or other performing arts would also meet the definition. There is caselaw confirming the use of TAC funds on stadium facilities, which clearly would be used by tourists, but also by local residents. There is also authority to support the City of Vancouver's use of TAC funds for the construction of an outdoor plaza. The Vancouver outdoor plaza project is the most similar one I have found to the Project.

RCW 67.28.120 authorizes any "municipality" either jointly or with any other municipality (such as the County) to acquire and to operate tourism-related facilities. Here, the City and the County are in a joint relationship to lease, develop and operate the Project.

Obviously if someone were to litigate whether the City has authority to use TAC funds, the issue will be fact based. There are no objective guidelines for determining if the Project is promoting tourism, so the Court will have the ultimate say on the issue. Subjective evidence can be offered as to the nature of the Project and the effect and/or affect on promotion of tourism within the City. In one MRSC article authored by Eric Lowell – "Can We Spend Lodging Tax Funds on That?" in addressing whether TAC funds could be used to improve a municipal golf course, the answer was "It depends. If the city can show that the golf course has a healthy number of tourists using it, then it could be an allowable use. If the municipal golf course is mainly used by locals, then most likely it would not be an eligible use of lodging tax funds."

In August 2016, the Attorney General issued an informal opinion clarifying lodging tax awards. The informal opinion, written by Assistant Attorney General H. Lee Overton, provides some clarity to the question of whether a municipality can award an amount that differs from the recommendation for the use of TAC funds. The informal opinion basically says the roles of the TAC committee and the municipality are clear: the committee is to make recommendations and the municipality is to make a final determination. The legislative body has the ability to award an

amount that differs from the recommendation, but in order to do so it must first submit the proposed changes to the committee under the provisions of RCW 67.28.1817(2) which states in part: “Any 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. 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.

I realize there is not a definitive answer to the question of whether TAC funds can be used to fund the Project. However, based on the proceeding and the prior approval of expenditures by the Auditor lead me to conclude the City is permitted to use the TAC funds on the Project.