

**Opinion No. 87-49**

August 31, 1987

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Michael J. Vargon, Assistant Attorney General

**TO:** Harroll Adams, State Auditor, PERA Building - Room 302, Santa Fe, New Mexico 87503

**QUESTIONS**

May lodger's tax revenues be used to support a toll-free "800" telephone service maintained by the Red River Chamber of Commerce pursuant to a contract or services agreement with the town of Red River?

**CONCLUSIONS**

Yes, but see analysis.

**ANALYSIS**

The town of Red River and the Red River Chamber of Commerce have entered into a services agreement whereby the Chamber of Commerce has agreed to provide certain promotional activities for the town of Red River. The town has agreed to compensate the Chamber of Commerce for expenses of the promotional activities from revenues derived from imposition of a lodger's tax. As part of its promotional activities, the Chamber of Commerce has established a toll-free "800" telephone number that is used to respond to inquiries about weather conditions, fishing reports, and recreational activities in Red River.

Section 3-38-15 NMSA 1978 authorizes municipalities to impose an occupancy tax, or lodger's tax, on lodging within the municipality. Section 3-38-21 NMSA 1978, as amended by Laws 1987, ch. 9, § 2, provides:

A municipality or county imposing an occupancy tax may use the proceeds thereof to defray costs of:

A. Collecting and administering the tax;

B. Establishing and operating, constructing, purchasing, otherwise acquiring, reconstructing, extending, bettering or otherwise improving fairgrounds, exposition buildings, field-houses, auditoriums, performing arts facilities, convention halls or other convention facilities of the municipality, of the county within which the municipality is located or of the county and acquiring improvements incidental thereto;

C. Equipping and furnishing such facilities, as specified in subsection B of this section, of the municipality or county;

D. Acquiring a suitable site, grounds or other real property or any interest therein for such facilities of the municipality or county;

E. The principal of and interest on any prior redemption premiums due in connection with and any other charges pertaining to revenue bonds authorized by Section 3-38-23 or 3-38-24 NMSA 1978;

F. Advertising, publicizing and promoting such facilities of the municipality or county and tourist facilities or attractions within the area;

G. Any combination of the foregoing purposes or transactions stated in this section; or

H. Provision of public transportation within a three mile area of a ski lift facility, provided that such a ski lift facility originates inside the boundaries or within three hundred feet of the boundaries of a municipality.

After the effective date of the amendments to the Lodger's Tax Act enacted by Laws 1987, ch. 9 (June 20, 1987), all counties and municipalities are allowed to impose an occupancy tax not to exceed five percent of the gross taxable rent. Those municipalities that impose an occupancy tax of two percent or less must devote not less than one-fourth of the tax proceeds to advertising, publicizing, and promoting facilities authorized in Section 3-38-21 NMSA 1978 and to "tourist attractions." See Section 3-38-15(D) NMSA 1978. Municipalities and counties that impose an occupancy tax of more than two percent must use not less than one half of the proceeds of the first three percent of the tax for advertising, publicizing, and promoting facilities authorized in Section 3-38-21 NMSA 1978 and "tourist attractions." See Section 3-38-15(E) NMSA 1978.

Expenditures required by Section 3-38-15(E) NMSA 1978 may be reduced if necessary to meet principal and interest payments on revenue or refunding bonds issued pursuant to Sections 3-38-23 or 3-38-24 NMSA 1978 before July 1, 1977. See Section 3-38-15(F) NMSA 1978. Sections 3-38-15D, E, and F NMSA 1978 thus operate as restrictions on the authorized expenditure of a portion of the revenues from the lodger's tax.

It is our opinion that, if a toll-free telephone service is used to promote the natural and man-made tourist attractions of the town of Red River, or to promote any facilities authorized by Section 3-38-21 NMSA 1978 within Red River, then the expenses of operating and maintaining such a service would be an authorized expenditure of lodger's tax revenues under Sections 3-38-21F and 3-38-15 NMSA 1978. To the extent that such telephone service is used to conduct any other business of the Chamber of Commerce, the Chamber must bear those costs.

This opinion assumes that the town of Red River has complied with all relevant provisions of the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978. Our office was not provided any information about the procedures the town of Red River

used to select a contractor for the services that are the subject of the services agreement. We understand, however, that the town of Red River has not adopted a home rule charter and it does not appear that any other exemption under Section 13-1-98 NMSA 1978, as amended by Laws 1987, ch. 348, § 2, would apply. The proposed budget for fiscal year 1987-88 for the Chamber of Commerce indicates that the total compensation the town of Red River will pay to the Chamber of Commerce pursuant to the services agreement is expected to be well in excess of \$20,000. Thus, the services agreement does not appear to qualify as a "small purchase" pursuant to section 13-1-125 NMSA 1978, as amended by Laws 1987, ch. 348, § 8. In any case, we note that the town of Red River must comply with the appropriate provisions of the Procurement Code if it desires to enter into the services agreement with the Chamber of Commerce. See Section 13-1-197 NMSA 1978.

Respectfully submitted,

**ATTORNEY GENERAL**

HAL STRATTON Attorney General