

Opinion No. 88-38

June 27, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Scott D. Spencer, Assistant Attorney General, Jeff McElroy, Assistant Attorney General

TO: Honorable E. Kelly Mora, New Mexico House of Representatives, P.O. Box 726, Raton, New Mexico 87740

QUESTIONS

Whether the City of Raton can utilize its occupancy tax proceeds to operate the La Mesa Park racetrack or help defer the expenses at the track?

CONCLUSIONS

No.

ANALYSIS

Section 3-38-15 of the Lodgers Tax Act, Section 3-38-13 to 3-38-24 NMSA 1978 ("Act"), authorizes a municipality or county to impose an "occupancy tax" on lodging revenues. Section 3-38-21 provides:

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

- A. collecting and otherwise administering the tax;
- B. establishing and operating, constructing, purchasing, otherwise acquiring, reconstructing, extending, bettering or otherwise improving fairgrounds, exposition buildings, fieldhouses, 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 such a ski lift facility originates inside the boundaries or within three hundred feet of the boundaries of a municipality.

La Mesa Park racetrack is privately owned and operated. The Act therefore does not authorize the City of Raton to spend lodgers tax proceeds to operate the La Mesa Park race track or to defer its expenses.

Article IX, section 14 of the New Mexico Constitution, commonly referred to as the "anti-donation clause," provides:

Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad.

The word "donation" in this section means a gift, allocation or appropriation of anything of value without consideration. See **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 303 P.2d 920 (1956). The New Mexico Supreme Court consistently has held that governmental entities may not use public funds to subsidize, promote or otherwise contribute to the operations of private corporations, associations or individuals. **Hotels of Distinction West, Inc. v. City of Albuquerque**, S. Ct. No. 17,564 issued June 3, 1988; **Chronis v. State ex rel. Rodriguez**, 100 N.M. 342, 670 P.2d 953 (1983); **State v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957); **Hutcheson v. Atherton**, 44 N.M. 144, 99 P.2d 462 (1940); **Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041 (1916). The City of Raton would therefore also violate the anti-donation clause if it spent lodgers tax proceeds to operate the La Mesa Park racetrack or to defer its expenses.¹

ATTORNEY GENERAL

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GENERAL FOOTNOTES

¹ Arguably, the racetrack may be a "tourist attraction", a term that the Act uses but does not define. A "tourist" is one who makes a tour; one who travels from place to place for pleasure or culture. **Jones v. State**, 64 Ga. App. 376, 13 S.E.2d 462 (1941).

An "attraction" is that which attracts. **Radcliffe v. Query**, 153 S.C. 76, 150 S.E. 352 (1929). Pursuant to Section 3-38-21E, a city may use lodgers tax money to promote, advertise or publicize tourist attractions within the area. The legislature therefore has determined that promoting tourism is a legitimate governmental purpose. However, to comply with the anti-donation clause the city must receive consideration in return the such expenditure, and the primary purpose of the expenditure must be for promoting tourism or the economy in general and not subsidizing the operations of the privately owned tourist facility or attraction.