

November 3, 2006

TO WHOM IT MAY CONCERN:

I write this open letter to bring to the attention of interested individuals a matter I believe is of importance to South Padre Island.

I brought the issues discussed below to the attention of the SPI Board of Aldermen and the Mayor fifteen months ago in a lengthy letter to each elected official with the request that the information therein might be made more widely available to the public. I believed then, as I do now, that most citizens are unaware of the legitimate uses to which SPI hotel/motel occupancy tax revenues might be put.

Current SPI Practice

The State of Texas imposes a 6% hotel/motel occupancy tax by room rate, the money collected thereby being placed in the State's general coffers. However, because SPI is a coastal community, it is entitled to a rebated portion of those State taxes collected within SPI. One-sixth is rebated back to the town with the requirement, by statute, that the rebated money be used for beach maintenance and cleaning.

In addition to the 6% tax levied by the State, the Town imposes a separate local 7% room rate hotel/motel occupancy tax (HOT tax), a levy rate commonplace among municipalities in Texas. This results in a rather large income stream for SPI, something over \$5 million per year, an amount above that collected even by city property taxes. (It may be worth noting in passing that this figure also far exceeds HOT taxes collected by most all other cities in Texas, even those which dwarf SPI in size and population.)

Chapter 351 of the **Texas Tax Code** codifies the rules governing how cities may use revenues collected from these local HOT taxes. The general rule (Section 351.101) is that "revenue from the municipal hotel occupancy tax may be used only to promote tourism in the convention and hotel industry," and "may not be used for the general revenue purposes or general governmental operations of a municipality." Further, revenue use must fall into one of six categories: (1) constructing/operating/maintaining convention center facilities/visitor information centers; (2) furnishing facilities/personnel/materials for registering convention delegates; (3) advertising/promotional programs to attract tourists; (4) promotion of the arts; (5) historical restoration/preservation; and in some instances (6) the promotion of sporting events.

On SPI it is widely promulgated that what I have referred to as the "general rule," paraphrased in the preceding paragraph, must govern our use of the locally collected HOT taxes. The catch phrase often heard "to put heads in beds" encapsulates the general impression regarding the limitations governing the use of this revenue. Ignoring

for the moment the fact that very little of this money has been used, at least to my knowledge, for two of the six categories permitted within the general rule -- the promotion of the arts or historical restoration/preservation -- and instead almost entirely for advertising, promotional events, and the convention center, it nevertheless remains apparent that residents believe SPI HOT tax revenue must be utilized in accordance with this general rule of Section 351.101.

Exceptions to the General Rule and Practices Elsewhere

Later sections of Chapter 351, however, specify for some municipalities certain exceptions to this general rule requirement. Of note are those exceptions specified for coastal communities, particularly those bordering upon the Gulf of Mexico. Many of these exceptions are somewhat detailed in specification, but they may be fairly reduced and encapsulated by the following general principle: such communities are either required or allowed to utilize significant portions of the revenue collected from the HOT tax for a wide variety of activities beyond those limitations listed in the general rule, particularly for activities connected to beach utilization. These include policing, code enforcement, maintenance, cleaning, nourishment, sanitation issues (bathrooms), safety/security issues, access, parking, and the like. These exceptions can be found in Sections 351.105 through 351.107.5 of Chapter 351. Generally speaking, coastal communities governed by home rule charters are required by law to spend three out of every seven pennies collected for such purposes, while general law coastal communities are permitted to spend any or all of collected revenues for these, and even wider purposes, in exception to the general rule.

While SPI takes money from its general fund for many of these activities, this is not the case in other incorporated coastal communities in Texas. Interestingly, due to the national seashore, various state parks, and the physical difficulties of accessing the barrier islands, there are actually few towns/cities in Texas bordering the Gulf of Mexico. Cities that border solely on the Laguna Madre (or Bay as you move north) are not eligible for these same exceptions (although there are other special exceptions of a slightly different order available to some such cities).

Moving north from South Padre Island, there are three cities in the Coastal Bend with beaches bordering the Gulf of Mexico. Corpus Christi spends three out of every seven cents collected through HOT taxes for these exceptions to the general rule. Port Aransas does so also. Fulton is a small general law community which apparently has a beach on the Gulf (although admittedly I'm not exactly sure how). It also has used portions of its HOT taxes for a variety of activities beyond the general rule. (I have spoken with their town attorney to verify this as well as to discuss his understanding of the law.) Rockport, also in this same geographic vicinity, once sought approval from the Attorney General to enjoy such HOT tax exceptions, but was denied because the town actually does not border the Gulf of Mexico.

As you move further north there are a couple of small Gulf communities, but no incorporated town actually on the Gulf until you get to Freeport, which does have a small beach; it is the only incorporated town in Texas other than South Padre Island which to my knowledge does not overtly actualize the legal exceptions. However, it is worth noting that Freeport only has six hotel/motels in the entire town and collects, according to my reading of their internal audit, only slightly over \$17,000 a year in HOT taxes.

Just north of Freeport is Galveston Island, almost all of which is encompassed by the City of Galveston. Galveston also spends three out of every seven pennies collected from HOT taxes in accordance with the available exceptions. Jamaica Beach is a general law municipality which also borders the Gulf in Galveston County. It is extremely small, a village really, and as of fifteen months ago had not utilized its HOT taxes in accordance with these exceptions, but it had plans to do so as soon as it was able to escrow enough funds to make any impact.

Moving further north is the Bolivar Peninsula. Port Bolivar is not an incorporated town. Neither is Gilchrist nor Crystal Beach, also on the Bolivar Peninsula. (I should add a caveat concerning Crystal Beach; its incorporated status has fluctuated over time, apparently depending upon which faction on this issue gains political control. I believe currently it is not incorporated, having last voted to rescind incorporation in 1987, but I am not 100% certain.) At the Louisiana border, Port Arthur is an industrial city without a municipal beach.

Thus, with the exception of Freeport, I believe South Padre Island is unique among incorporated communities with a beach on the Gulf in not utilizing portions of its HOT taxes for those types of activities allowed by law as exceptions to the general rule.

Legislative Intent

It is not difficult to infer the legislative purpose for providing such exceptions. In the first place, the major tourist attraction for such locales is the beach. Thus, utilizing HOT revenues for the maintenance, enhancement, safety, and security of such a tourist attraction is in keeping with the basic philosophy behind HOT tax purposes.

Second, beaches in Texas are, by law, open for and to the public. However, the law also prescribes that the responsibility for the maintenance, oversight, and accessibility of those portions of beach lying within the boundaries of a municipality accrues to that municipality. The principal users of the beach, however, are not necessarily the residents of the municipality, but rather the general public at large. (Certainly that is the case on South Padre Island.) To require that the costs associated with fulfilling this responsibility must be defrayed out of the municipal general fund, garnered principally from town residents, could easily impose an undue or impractical burden on town citizens asked to meet a state-mandated policy benefiting the general public.

Since the principal users of the beach are likely to be tourists, allowing some portion of HOT taxes -- derived from the visiting tourists themselves -- to be utilized toward the fulfillment of this municipal responsibility is a way, albeit indirect, for the major users of the beach, rather than the residents, to provide the needed revenue source. And, of course, as beach utilization increases or decreases, so do the costs associated with maintenance and oversight, but so do the revenues as well, in similar direct ratio.

Section of Chapter 351 Applicable to South Padre Island

Section 351.1055 subsection (c) of Chapter 351 is the subsection of the law I believe directly applicable to South Padre Island. The relevant portions are quoted below in italics. Please note that I have inserted some of my own explanatory comments, not in italics and within brackets.

Notwithstanding any other provision of this chapter, a municipality that has a population of less than 5,000 adjacent to a home-rule city with a population of less than 80,000 may use all or any portion [my underlining] of the revenue heretofore or hereafter derived from the municipal hotel tax:

- (1) to clean and maintain the beaches in the municipality; ["clean and maintain" is defined in Section 61.063 of the **Natural Resources Code** as "the collection and removal of litter and debris and the supervision and elimination of sanitary and safety conditions that would pose a threat to personal health or safety if not removed or otherwise corrected and includes the employment of lifeguards, beach patrols, and litter patrols."]*
- (2) to provide beach security within the municipality; [which is defined earlier in Chapter 351, Section 351.1055 (a) as "beach patrol, lifeguard services, marine water safety, and park law enforcement"]*
- (3) for any of the purposes permitted or allowed by Section 1504.001, **Government Code**; [these purposes are rather far-reaching and include the establishment and operation of a host of civic buildings/endeavors including civic centers, libraries, museums, recreational facilities, adjacent parking, etc.]*
- (4) for any purpose allowed by Section 351.105; [the tax revenue use provisions more generally applicable -- what I have referred to above as the "general rule."]*
- (5) to pay the principal of or interest on bonds or notes issued for any of these purposes.*

Port Isabel is obviously a home rule city with a population under 80,000 and South Padre Island is currently defined as a municipality with a population under 5,000. I anticipate questions from some quarters, however, as to whether or not these two cities are "adjacent," so please excuse me if I belabor this point somewhat.

Sometimes in everyday conversation people may confuse "adjacent" and "contiguous" without much loss of communication, but the two words have different meanings. Two entities are contiguous if they abut or otherwise touch upon one another. Two cities, for example, are contiguous if they share the same boundary line. The word "adjacent," however, implies being nearby or in close proximity, but not necessarily contiguous. Two entities are adjacent if they lie nearby to one another and are not separated by a third entity of the same type. Thus, two contiguous entities must *ipso facto* also be adjacent, but two entities may be adjacent although not contiguous. Thus, for example, a farmhouse may be said to have an adjacent barn even though there may be some distance between the two structures. You will find this distinction given in most good general usage dictionaries, including **Webster's** and the **Oxford English Dictionary**.

In addition, "adjacent" is defined in **Black's Law Dictionary** (6th Edition, 1990) as follows: "lying near or close to; sometimes contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes."

In Texas law I believe the established precedent is found in *State of Texas ex rel. Pan American Production Company v. Texas City, Texas, May 22, 1957, Supreme Court of Texas*. I quote from the majority decision: "The term 'adjacent' is not a word of fixed or definite meaning. The authorities are almost unanimous in according to that term the meaning of 'neighboring or close by' or 'in the vicinity of and not necessarily contiguous or touching upon.' The meaning is determined to some extent by the context or by the subject matter."

This same language was reiterated and thus reified in another later Texas Supreme Court decision of *City of Waco v. City of McGregor, 523 S.W.2d 649, 653 (Tex. 1975)*.

Additionally, as recent as 2003 these two cases were referenced as dispositive in a formal Attorney General opinion offered by Attorney General Greg Abbott (Opinion No. GA-0014) who writes the following: "Adjacent has been defined by the courts to mean 'neighboring or close by' or 'in the vicinity of and not necessarily contiguous or touching upon.'"

Moreover, the term is in standard common usage with reference to islands. An island, because it is surrounded by water, cannot by definition be contiguous with any other land mass. However, it is quite common in geographical descriptions throughout the world to speak of a "string" or "cluster" of "adjacent islands," or an island being "adjacent to the mainland," or a mainland and its "adjacent islands."

I have no doubt that South Padre Island is a barrier island adjacent to the Texas mainland, and that South Padre Island and Port Isabel are thus adjacent, or neighboring, cities separated only by water. (This circumstance is not contrary to the recent appellate court reasoning which disposed of, at least to date, the annexation threat by Port Isabel, for leaving aside other somewhat tangential issues of legal standing and/or procedural violations, the substantive issue hinged upon the improper annexation solely of open water without contiguous land mass.)

In short, under the auspices of this subsection of Chapter 351, South Padre Island is, I believe, permitted to use whatever portions of its HOT tax revenues it so chooses for any or all of the listed activities presented in Section 351.1055 subsection (c) quoted above.

Advisability of Using Some HOT Tax Revenue for Purposes Beyond Current SPI Practice

The question I have thus far addressed is a question of fact. Is it or is it not permissible for South Padre Island to utilize portions of its HOT tax revenue for activities beyond current practice, and particularly for numerous matters connected with beach utilization? To reiterate, I believe the answer to that question is "yes." Practices common elsewhere in similar cities, legislative intent, and the letter of the law all seem to support this conclusion. I do recognize that contrary positions on this matter may have become entrenched through local practice over time and there may be a willful predisposition to answer the question in the negative. Although I believe one must strain to arrive at such a conclusion, if there are, nevertheless, widespread doubts about the legitimacy of the position I articulate, at the very least there should be a formal -- but impartially worded -- inquiry made to the Office of the Attorney General. Moreover, even if there is then found to be some technical wording in the law contradicting my understanding, perhaps the result of nuance beyond my limited intellectual abilities, I am certain that there would be strong legislative support to correct such wording, for I find it impossible to believe that South Padre Island should be the only coastal community prevented from the commonly exercised exceptions and more liberal usage for these funds.

Regardless, my principal goal is for people to reconsider this question of fact, for I believe there is widespread misinformation regarding this issue, and I doubt that people can make wise decisions without having accurate information.

A second, and subsequent, question is whether or not it is advisable to use some portion of the HOT funds for the kinds of activities I have outlined above. This is a question of judgment, not fact, and therefore subject to differing opinions, which may be reasonable despite their variance. If residents knew, however, that a broader use of these funds were permissible, I believe many would be of the opinion that such permissibility should be actualized, at least to some degree. If so, that is an opinion I would share, and I will briefly offer three reasons why.

- (1) Many costs associated with some of the activities listed above are currently paid for on SPI out of the general fund. These include beach policing, code enforcement, construction/maintenance of beach access, sanitation (bathroom facilities), parking, and the like. In my opinion, this is an undue burden on town residents. If some money from HOT revenues were utilized to help defray such expenditures, this would release general fund monies now encumbered for such purposes, allowing them instead to be redirected to other activities/functions bettering resident life, or alternatively, returned to the residents themselves.

- (2) Relying largely upon general fund revenues for such purposes is impractical because the resulting budgeting pressures make it difficult to meet perceived needs effectively. In other words, it is difficult to meet specific needs with excellence without money, and when a large pot of money, potentially available for such needs, is erroneously identified as untouchable, needed projects may be left unattended, or where they are addressed, quality may suffer. I hesitate to offer specific examples, as I know my own judgments on particular specifics are uneducated. No doubt, for example, many on the "Beach and Dune" committee would have a better idea about the priority needs relative to beach issues. I will venture only the untutored layman observations that the beach accesses are paltry, worker access is problematic, parking seems to be an omnipresent challenge, bathroom facilities are limited, dune restoration is under-attended, and park/recreational venues are nonexistent. I will offer no particular suggestions with regard to the interesting item #3 in Section 351.1055 Subsection (c) quoted above except to recall it to your attention. It implies many possibilities.

- (3) SPI is a tourist destination because of the beauty and allure of its beaches. Certainly no special event, no advertising spot, no marketing campaign, no matter how clever, comes close to competing with the visitor attraction of the beach itself. Short-term gains in stimulating tourist interest may be made by dedicating all HOT revenues to advertising, etc., but in the long run attracting visitors and retaining their interest to return is dependent upon the wise management and protection of our beaches. Suitable enhancements maximizing tourists' sense of security, ease, and delight in their enjoyment of the beach experience, accompanied by appropriate husbandry of the natural environment, will result in long-standing and increased future benefits to the tourist industry unmatched by other activities.

Conclusion

My purpose is not to champion the use of HOT revenues for any one particular activity. People no doubt have differing ideas about what potential activities might take priority. Decisions about such matters are largely political, requiring the airing of various perspectives, compromise resolution, and consensus building. The first step towards

this, however, is to recognize what possible uses for this revenue are legitimately available. My hope is to stimulate this first step.

In any case, if you have read this far, I thank you for your indulgence. I hope some may have found the information of benefit.

Sincerely,

Will Davis

PS. Some of the above information is easily corroborated on the Internet. Some not. To access the full Chapter 351, you might want to go here.

<http://tlo2.tlc.state.tx.us/statutes/tx.toc.htm>

The two Texas Supreme Court cases are not available on the Internet. However, the recent Attorney General opinion is. If you are interested, you might go here.

<http://www.oag.state.tx.us/opinions/op50abbott/ga-0014.htm>

The city of Fulton received publicity a few years ago when some citizens challenged a variety of fiscal issues. Some of those matters are irrelevant, but the position on HOT taxes was articulated by the town attorney and covered in a local newspaper. If you're interested, you might go here.

<http://www.rockportpilot.com/articles/2004/04/02/news/news01.txt>

The following is an audio broadcast of an oral report recently given on HOT taxes in Galveston. It is full of local politics, but does provide an explanation of how Galveston spends its HOT taxes.

<http://www.guidrynews.com/05March/08105ParkBoard.htm>

The following newspaper article from the **Corpus Christi Caller Times** is not overly helpful, as it focuses on only one activity, but it does show that the city spends some of its HOT taxes for beach-related activities rather than advertising, etc.

http://www.caller.com/ccct/local_news/article/0,1641,CCCT_811_3832283,00.html

Internal audits (year-end reports) are available online at each city's web site.