



Commonwealth of Kentucky
Office of the Attorney General

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OAG 20-14

- Subject:* Whether Harrodsburg City Resolution 2020-03-23(a), which purports to alter the payment of the restaurant tax imposed under KRS 91A.400, is a valid exercise of the City's home rule powers under Kentucky law, including Section 156b of the Kentucky Constitution.
- Requested by:* Mike Inman, Chair
Harrodsburg/Mercer County Tourist Commission
- Written by:* Charles A. English, Assistant Attorney General
- Syllabus:* Harrodsburg City Resolution 2020-03-23(a) is void under KRS 83A.060(3) because ordinances may only be amended by a subsequent ordinance that sets forth the amendment at length. Notwithstanding its procedural deficiencies, the Resolution also is substantively invalid because it directly conflicts with KRS 91A.400 by ordering restaurants to retain tax moneys collected.

Opinion of the Attorney General

The Harrodsburg/Mercer County Tourist Commission ("Tourist Commission") requests this Office's opinion on whether Harrodsburg City Resolution 2020-03-23(a) is a valid exercise of the City's home rule powers under Section 156b of the Kentucky

Constitution and KRS 82.082(2). In 2007, the City of Harrodsburg passed Ordinance 2007-09, levying a restaurant tax under KRS 91A.400(3) and providing for its remittance to the Tourist Commission. Specifically, KRS 91A.400(3) provides that “the city legislative body in an authorized city may levy a[] . . . restaurant tax not to exceed three percent (3%) of the retail sales by all restaurants doing business in the city. All moneys collected from the tax authorized by this section shall be turned over to the tourist and convention commission established in that city[.]” However, in response to the current public health emergency and the resulting economic hardships for the restaurant industry, the City of Harrodsburg recently passed Resolution 2020-03-23(a), which, in relevant part, provides:

NOW THEREFORE BE IT RESOLVED that the Harrodsburg City Commission orders that all currently existing restaurants subject to Ordinance Number 2007-9 continue submitting the prescribed forms to the HMCTC for the months of March 2020 and April 2020 showing the gross sales from food and non-alcoholic beverages, and calculate the tax due for that month as prescribed by Ordinance 2007-9 and submit these forms to HMCTC but that they retain the tax due for March 2020 and April 2020 for their own restaurant’s benefit and existence. It is further ordered that there be no late fee levied by the HMCTC for delinquent payment for February if not made.

In other words, the Resolution did not suspend or repeal the restaurant tax under Ordinance 2007-09. Rather, the tax remains in effect and restaurants still must submit the tax reporting forms to the Tourist Commission, showing the gross sales from food and non-alcoholic beverages and calculating the tax due. Now, however, instead of turning the tax over to the Tourist Commission as required by KRS 91A.400(3), the resolution purports to allow restaurants to retain the tax for their “benefit and existence.”

Before this Office can reach the substance of the Tourist Commission’s question, we must first address a procedural defect in Resolution 2020-03-23(a). The Resolution purports to amend Ordinance 2007-09. However, KRS 83.060(3) provides, “No ordinance shall be amended by reference to its title only, and ordinances to amend shall set out in full the amended ordinance or section indicating any text being added by a single solid line drawn underneath it.” As held in *August Properties, LLC v. City of Burgin*, 2017 WL 4862511, at *6 (Ky. App. Oct. 27, 2017), actions taken by cities that “are inconsistent with the actual Ordinance, are simply *null and void*” (emphasis added). Because the City has attempted by the Resolution to amend its prior ordinance, but the amendment is not set out in full in an ordinance as required by KRS 83.060(3), the Resolution is procedurally defective, and therefore void.

Although this Office finds that Resolution 2020-03-23(a) violated KRS 83A.060(3), the City of Harrodsburg's apparent goal of assisting the struggling restaurant industry is commendable. Restaurants in particular have been hard hit by the COVID-19 pandemic, with the Kentucky Restaurant Association estimating that "20% of the restaurants in the state will close due to the pandemic."¹

Notwithstanding this Office's determination that the City did not comply with the procedural requirements of KRS 83A.060(3), the substance of the resolution also is invalid under Section 156b of the Kentucky Constitution and KRS 82.082. Section 156b provides that "cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city and *not in conflict with a constitutional provision or statute.*" Ky. Const. § 156b (emphasis added); see KRS 82.082(1) (same). "A [city's] power or function is in conflict with a statute if it is expressly prohibited by a statute." KRS 82.082(2). Here, Resolution 2020-03-23(a) orders restaurants to retain tax moneys collected instead of "turning them over" to the Tourist Commission. This command conflicts with KRS 91A.400, and is therefore void.

First, KRS 91A.400(3) use the term "shall" in stating its requirements. "Shall," as used in the statute, is mandatory. KRS 446.010(39). However, rather than "turn over" the moneys collected as required by statute, the Resolution permits restaurants to retain the restaurant tax due under Ordinance Number 2007-9. As the Kentucky Supreme Court has held, "[t]he law on this issue is clear." *Kentucky Rest. Ass'n v. Louisville/Jefferson Cty. Metro Gov't*, 501 S.W.3d 425, 428 (Ky. 2016). Although "[l]ocal governments in Kentucky are vested with broad authority . . . the sovereignty of the state stills rules supreme." *Id.* at 427-28. Just as an ordinance cannot forbid what a statute expressly permits, *id.* at 428, an ordinance also may not permit what a statute forbids. "This is precisely the type of 'conflict' that is forbidden under Section 156b of our Constitution and KRS 82.082(2)." *Id.* Therefore, the portion of the Resolution purporting to alter the payment of the restaurant tax is invalid.

The City of Harrodsburg's apparent intent in passing the Resolution—to assist small businesses during difficult economic times—is laudable, and that intent is not lost on this Office. Nonetheless, the law must be followed at all times, including during a pandemic. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times."); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 ("While the law may take periodic naps during a pandemic, we will not let it sleep through one."). For

¹ Gil Corsey, WDRB.com, *Kentucky restaurant owners desperate for federal funding to remain open as pandemic continues* (July 31, 2020), available at https://www.wdrb.com/news/business/kentucky-restaurant-owners-desperate-for-federal-funding-to-remain-open-as-pandemic-continues/article_64b0bb3c-d342-11ea-9e11-37c235238448.html (last visited Aug. 20, 2020).

these reasons, this Office finds that Resolution 2020-03-23(a), which purports to amend Harrodsburg City Ordinance 2007-09, is null and void under KRS 83A.060(3) because ordinances may only be amended by a subsequent ordinance that sets forth the amendment at length. Notwithstanding its procedural deficiencies, Resolution 2020-03-23(a) also is invalid due to its allowance of the restaurants' retention of the restaurant tax proceeds without turning over the funds collected.

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