Tourist Development Tax Expenditures

Number: AGO 2016-18

Date: December 06, 2016

Subject:
Tourist Development Tax Expenditures

Ms. Michelle Blankenship Jordan
County Attorney for Jackson County
1512 Highway 90
Chipley, Florida 32428

RE: TAXATION – COUNTIES – TOURIST DEVELOPMENT TAX – whether the county can fund law enforcement services at a nature center using tourist development tax revenues under s. 125.0104(5)(b), Fla. Stat.

Dear Ms. Jordan:

On behalf of the Jackson County Board of County Commissioners, you have asked for an opinion on essentially the following question:

Does section 125.0104(5)(b), Florida Statutes, authorize the use of tourist development tax revenues to provide law enforcement at a nature center?

In sum:

Section 125.0104(5)(b), Florida Statutes, allows county government to use tourist development tax revenues to "acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote" a nature center, and does not authorize law enforcement services.

Section 125.0104, Florida Statutes, the Local Option Tourist Development Act, authorizes any county of this state to levy a "tourist development tax." Section 125.0104(5)(a), Florida Statutes, enumerates the permissible uses of revenues generated from the tax, including, for example, the building and operating of convention centers, sports stadiums, aquariums, museums, tourist bureaus, beach park facilities, etc., and the promotion of tourism. Section 125.0104(5)(b), Florida Statutes, authorizes additional uses, permitting counties with fewer than 750,000 people:

"to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more zoological parks, fishing piers or nature centers which are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public."

You previously submitted a request for an opinion as to whether section 125.0104(5)(b), Florida Statutes, authorized Jackson County to expend tourist development tax revenues to construct a nature center with a boat ramp and an elevated platform for bird and landscape observation. In response, this office issued Attorney General Opinion 2015-14, concluding that such uses were

consistent with the statute, if the county were to make the legislative determination that the project related to and primarily promoted tourism.

In your current inquiry, you suggest that expenses associated with law enforcement services (sheriff and police) might be authorized by subsection (5)(b) as part of the “maintenance” or “operation” of the nature center. Under a plain reading of the provision, however, the terms “maintain” and “operate” apply to the running of the nature center itself, whereas law enforcement would be providing the additional services of preventing and detecting unlawful activity occurring at the nature center.[1] Section 125.0104(5)(e), Florida Statutes, explicitly states: “Any use of the local option tourist development tax revenues collected pursuant to this section for a purpose not *expressly authorized* by … paragraphs (a) – (d) of this subsection is expressly prohibited.”[2] (e.s.) When there is doubt as to whether the Legislature has expressly authorized a particular exercise of taxation power, such doubt must be resolved against the local government imposing the tax.[3]

A general rule of statutory construction is that, when the Legislature wishes to authorize certain conduct, it well knows how to express itself, which is best illustrated by the Legislature’s inclusion of such conduct in another part of the same statute in question.[4] In 2016, the Legislature amended section 125.0104(5), Florida Statutes, to add a new subsection (c), expressly authorizing use of tourist development tax dollars for law enforcement in certain counties, as follows:

“(c) A county located adjacent to the Gulf of Mexico or the Atlantic Ocean, except a county that receives revenue from taxes levied pursuant to s. 125.0108, which meets the following criteria may use up to 10 percent of the tax revenue received pursuant to this section to reimburse expenses incurred in providing public safety services, including emergency medical services as defined in s. 401.107(3), and *law enforcement services, which are needed to address impacts related to increased tourism and visitors to an area*. However, if taxes collected pursuant to this section are used to reimburse emergency medical services or public safety services for tourism or special events, the governing board of a county or municipality may not use such taxes to supplant the normal operating expenses of an emergency medical services department, a fire department, a sheriff’s office, or a police department. To receive reimbursement, the county must:
1. Generate a minimum of $10 million in annual proceeds from any tax, or any combination of taxes, authorized to be levied pursuant to this section;
2. Have at least three municipalities; and
3. Have an estimated population of less than 225,000, according to the most recent population estimate prepared pursuant to s. 186.901, excluding the inmate population.

The board of county commissioners must by majority vote approve reimbursement made pursuant to this paragraph upon receipt of a recommendation from the tourist development council.” (e.s.)

You acknowledge in your letter that Jackson County is not eligible to use revenues under this provision. Had the Legislature intended other counties to use revenues generated by the tourist development tax to provide law enforcement services, it would have expressly authorized such use in a manner comparable to this provision.

In Attorney General Opinion 1990-14, this office concluded that subsection (5)(a)2. [now (5)(a)3.], which permits use of tourist development tax revenues "[t]o promote and advertise tourism[,]" did not authorize the use of such funds either for regular law enforcement or for extra police protection during special events or holidays.

"The provision of law enforcement within the county is an integral and constituent part of county government, with no special benefit or service being extended to a particular area or property or to a portion or segment of the county. It is the performance of a governmental duty owed to the general public at large.

The funding of general law enforcement within the county or the provision of additional law enforcement at special events or during particular holidays may, in fact, affect and benefit tourism within the county. However, the provision of such law enforcement functions owed to the public at large, whether generally or at special events or during certain holidays, does not have the promotion and advertisement of tourism as its primary purpose."

Similarly, although the provision of law enforcement at a nature center could be said to beneficially affect its maintenance and operation, law enforcement's primary function would not be to maintain or operate the facility, but instead, to enforce the laws of Florida.

In Attorney General Opinion 1990-55, Nassau County asked whether the county could use tourist development funds to, among other uses, fund "additional law enforcement patrols or lifeguards" at the beach. This office reiterated that law enforcement functions are owed to the public at large and were not subsumed within the authorization for "beach improvement, maintenance, renourishment, restoration, and erosion control" under section 125.0104(5)(a)4., Florida Statutes [now (5)(a)5.]. Construing these terms by reference to other language in the statute, this office concluded that the enumerated terms related "to the actual, physical nature of the beach" and did not contemplate "activities which do not protect or enhance the physical nature of the beach."

Finally, Flagler County previously asked this office whether tourist development tax funds could be used to purchase all-terrain vehicles for the police and fire department to use on Flagler Beach. The county represented that law enforcement would use the vehicles to "watch for persons causing damage to the dunes and enforce state laws and county and city ordinances protecting the beach and dunes," and would "protect citizens and tourists and … survey the beach for erosion damage and the need for maintenance and renourishment." The county suggested that these uses were allowed by subsection (5)(a)4. [now (5)(a)5.], which permits use of tourist development tax revenues "[t]o finance … beach improvement, maintenance, renourishment, restoration, and erosion control[.]" While this office stated in Attorney General Opinion 1992-66 that it was the role of the county government to determine whether the use of all-terrain vehicles would primarily serve to control beach erosion, the Attorney General suggested that "[t]he proposed beach patrols appear to be designed primarily to provide a monitoring system for activities on the beach, *i.e.*, protecting beachgoers[,]" which would not be an appropriate use of tourist development tax dollars under the statute.

Consistent with the reasoning of these prior opinions, the terms applicable to your request, authorizing use of tourist development tax revenues to "acquire, construct, extend, enlarge,

remodel, repair, improve, maintain, operate, or promote" a nature center, appear to allow the county to direct funds only to support the actual nature center facility and environs, including personnel to run the center. In contrast, as part of their regular duties, law enforcement officers are required to provide preventive and protective services to the general public, including those who are making use of the nature center, and there is no provision in the statute allowing the county to fund general law enforcement activity at a nature center with tourist development tax revenues.

Therefore, I am of the opinion that revenues derived from the local tourist development tax may not be used to fund regular police protection at a nature center under section 125.0104(5)(b), Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

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[1] Section 943.10(1), Fla. Stat., defines the primary responsibility of a law enforcement officers as "the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." See also s. 112.531(1), Fla. Stat.

[2] Black's Law Dictionary defines the term "express" to mean: "Clearly and unmistakably communicated; stated with directness and clarity." *Black's Law Dictionary* (10th ed. 2014). *See, e.g., Phantom of Clearwater, Inc. v Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).

[3] *See State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994).

[4] *See Cason v. Dep't of Mgmt. Services*, 944 So. 2d 306, 315 (Fla. 2006); *Rollins v. Pizzarelli*, 761 So. 2d 294, 298-99 (Fla. 2000); *Paragon Health Services, Inc. v. Central Palm Beach Cmty. Mental Health Center, Inc.*, 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003).