Tourist Development Tax -- Tourism

Number: AGO 2013-29

Date: December 31, 2013

Subject:
Tourist Development Tax -- Tourism

Ms. Cynthia L. Hall
Office of the County Attorney
1111 12th Street, Suite 408
Key West, Florida 33040

RE: TOURIST DEVELOPMENT TAX – TAXATION – COUNTIES – TOURISM – county with population of less than 750,000 may use tourist development tax revenues for improving, repairing, and maintaining a naturally occurring coral reef. s. 125.0104, Fla. Stat.

Dear Ms. Hall:

On behalf of the Monroe County Board of County Commissioners, you have asked for my opinion on substantially the following question:

Whether local option tourist development taxes can be used to fund a coral outplanting project to repair or improve a naturally occurring reef under the language contained in section 125.0104(5)(b), Florida Statutes?

In sum:

The use of Monroe County tourist development tax revenues for a coral outplanting project to repair or improve a naturally occurring reef is permissible under section 125.0104(5)(b), Florida Statutes, as the repair, improvement, or maintenance of a zoological park or nature center if the county makes the appropriate findings.

Section 125.0104, Florida Statutes, known as the Local Option Tourist Development Act[1] (the act), authorizes a county to impose a tax on short-term rentals of living quarters or accommodations within the county unless such activities are exempt pursuant to Chapter 212, Florida Statutes.[2] The purpose and intent of section 125.0104, Florida Statutes, is to "provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioneers and tourists from within and without the state to a particular area or county of the state."[3]

Subsection (5) of the act sets forth various purposes for which revenues from the tax may be used. Relevant to the question you have posed, section 125.0104(5)(b), Florida Statutes, authorizes the expenditure of tax revenues for the following purpose:

"Tax revenues received pursuant to this section by a county of less than 750,000 population

imposing a tourist development tax may only be used by that county for the following purposes in addition to those purposes allowed pursuant to paragraph (a): 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. All population figures relating to this subsection shall be based on the most recent population estimates prepared pursuant to the provisions of s. 186.901. These population estimates shall be those in effect on July 1 of each year."

You advise this office that the population of Monroe County qualifies it to take advantage of this provision.[4]

Where a statute enumerates those things upon which it will operate or forbids certain things, it is ordinarily construed as excluding from its operation all things not expressly mentioned.[5] Thus, the specific provisions of section 125.0104(5)(a) and (b), Florida Statutes, limit the expenditure of tourist development tax revenues to those enumerated and imply the exclusion of all others.[6] This office has consistently determined that tourist development tax revenues may only be used for the purposes enumerated in section 125.0104(5)(a) and (b), Florida Statutes.[7]

In Attorney General Opinion 97-48, this office was asked to consider whether a county could use tourist development tax dollars to construct an artificial reef to provide diving and snorkeling opportunities in waters bordering the county. Information provided with the opinion request suggested that the proposed artificial reef was to be part of a larger scheme to develop an aquatic nature center. After determining that an aquatic nature center could be characterized as a nature center within the scope of section 125.0104(5)(b), Florida Statutes, it was concluded that tourist development taxes could be used for its development. The opinion notes that "[u]ltimately, however, the determination of whether a particular expenditure satisfies the requirements of section 125.0104, Florida Statutes, is the responsibility of the governing body of the county and cannot be delegated to this office."

In Attorney General Opinion 94-12, this office determined that expenditures from tourist development tax revenues for the acquisition of a railway right-of-way and construction of a public recreational trail would appear to be within the scope of expenditures authorized by section 125.0104, Florida Statutes. The opinion considered the provision in section 125.0104(5) allowing counties with a specified population to use tourist development tax revenues "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."[8] Relying on a general definition of the term "nature center"[9] and the use of that term along with zoological parks and fishing piers, the opinion concludes that tourist development tax revenues in counties with populations of less than 600,000 (now 750,000) persons could be used to acquire property for a project similar to a nature trail or preserve open to the public.

Like the counties in the opinions discussed above, Monroe County has a population of less than 750,000 and may take advantage of the additional purposes authorized in section 125.0104(5)(b), Florida Statutes, which include the repair, improvement, or maintenance of a zoological park or nature center as described in section 125.0104(5)(b), Florida Statutes.

The Florida Keys National Marine Sanctuary is one of 14 sanctuaries created pursuant to the National Marine Sanctuary Act.[10] The act designates "as national marine sanctuaries areas of the marine environment which are of special national significance and provides authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them[.]"

The Florida Reef Tract stretches for approximately 150 miles on the eastern or Atlantic Ocean side of the Florida Keys, from north of Miami to the Tortugas Banks, and is approximately 4 miles wide. All but a small portion of the Florida Reef Tract at its northern end lies within the boundaries of the Florida Keys National Marine Sanctuary. Approximately 60% of the Florida Keys National Marine Sanctuary lies within State of Florida waters and the sanctuary is jointly managed by the National Oceanic and Atmospheric Administration and the State of Florida under a co-trustee agreement.

The Board of County Commissioners has received a request from a not-for-profit corporation for tourist development funds levied and collected pursuant to section 125.0104, Florida Statutes. According to the request, tourist development taxes would be used to pay for outplanting nursery-grown staghorn coral fragments (which had been harvested and transferred to existing underwater nurseries) to reefs off Key Largo and nursery-grown elkhorn coral fragments to three Key Largo reefs. The corals in the project had been collected under permits issued by NOAA/Florida Keys National Marine Sanctuary and sprigs were then "cloned" at underwater nurseries operated by the not-for-profit organization. The nurseries had previously been built and/or expanded by the non-profit using money from other grants. According to the application, the funds, if awarded, would be used to take coral sprigs from the nurseries and outplant them by transporting the "reef ready" nursery-grown corals to the "restoration sites," where they would be "strategically attached to the reef using underwater epoxy, cement, or cable ties." The not-for-profit organization operates its coral nurseries, collection sites, and restoration sites in state and federal waters along and near the reef under permits by the National Oceanic and Atmospheric Agency including waters within the Florida Keys National Marine Sanctuary.

The Board of County Commissioners of Monroe County has issued a statement supporting and endorsing the "establishment of coral reef nurseries as zoological parks throughout the Florida Keys National Marine Sanctuary[,]"[11] The project under consideration has been characterized for purposes of section 125.0104(5), Florida Statutes, as the repair, improvement, or maintenance of a zoological park or nature center. The Florida Keys National Marine Sanctuary and the Florida Reef Tract are publicly owned, protected, and managed marine environments open to the public for recreational and educational activities including diving, swimming, snorkeling, and fishing.[12] Based on previous opinions of this office and a consideration of what may constitute a nature center or a zoological park,[13] it appears that this use of tourist development tax funds for the repair, improvement, or maintenance of this area would be within the scope of the statute. Ultimately, however, the governing body of the county must make the determination that the expenditure of tourist development tax revenues is for a purpose that falls within the enumerated authorized uses in section 125.0104(5), Florida Statutes.

In sum, it is my opinion that local option tourist development taxes can be used to fund a coral outplanting project to repair or improve a naturally occurring reef under the language contained in section 125.0104(5)(b), Florida Statutes, if the county makes the appropriate findings.

Sincerely,

Pam Bondi
Attorney General

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[1] Section 125.0104(1), Fla. Stat.

[2] *See* s. 125.0104(3)(a), Fla. Stat., which states that it is the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in "any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, condominium, or timeshare resort for a term of 6 months or less is exercising a privilege which is subject to taxation under this section . . . ."

[3] *See* Ops. Att'y Gen. Fla. 10-09 (2010), 95-71 (1995), 94-12 (1994), 87-16 (1987), and 83-18 (1983).

[4] Your letter states that Monroe County had a population of under 74,000 according to the 2010 U.S. Census.

[5] *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). *And see* Op. Att'y Gen. Fla. 88-49 (1988) (the expenditure of tourist development tax revenues is limited to those purposes set forth in the statute).

[6] *And see Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) and *Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944), for the proposition that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.

[7] *See* Ops. Att'y Gen. Fla. 86-68 (1986) (tourist development tax revenues may be used for beach cleaning and maintenance) and 87-16 (1987) (tourist development tax revenues may be used to improve, maintain, renourish, or restore public shoreline or beaches of inland freshwater lake). *Cf.* Ops. Att'y Gen. Fla. 91-62 (1991) (construction of boat ramps and attendant parking facilities in proximity to inland lakes and rivers not a proper use of tourist development tax revenues); 90-55 (1990) (no authority to use tourist development tax revenues to construct beach parks, fund additional law enforcement patrols or lifeguards on the beach, or build and maintain sanitary facilities on or near the beach); and 88-49 (1988) (no authority to use tourist development tax revenues to acquire real property for public beach access).

[8] Section 125.0104(5)(b), Fla. Stat.

[9] *See* Op. Att'y Gen. Fla. 94-12 (1994), stating that the "term 'nature' is defined as 'the aspect of the out-of-doors (as a landscape): natural scenery.' Use of the word 'center' connotes 'a point around which things revolve: a focal point for attraction, concentration, or activity.'"

[10] *See* Pub. L. No. 92-532 s. 301 (Oct. 23, 1972), now codified at 16 U.S.C. ss. 1431-1445b

(2012).

[11] *See* Monroe County Resolution 211-2013.

[12] *See* Florida Keys National Marine Sanctuary website: http://floridakeys.noaa.gov/visitor_information/welcome.html?s=visit, for a description of the public activities and programs available in the sanctuary.

[13] The statute does not define the term "zoological park," but a common definition of the word "zoological" suggests that it relates to something concerned with animals or that it relates to the animal life of a particular area. *See* The American Heritage Dictionary (office ed. 1983), p. 794; *and* Webster's New Universal Unabridged Dictionary (2003), p. 2212.