Infrastructure surtax, beach erosion projects/studies

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Subject:
Infrastructure surtax, beach erosion projects/studies

Mr. D. Andrew Smith, III
Shepard, Smith & Cassady, P.A.
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Maitland, Florida 32751

RE: MUNICIPALITIES--INFRASTRUCTURE–-TAXATION--BEACHES--BEACH EROSION--SURTAX--whether city may use local government infrastructure surtax to fund beach erosion control projects and studies. s. 212.055, Fla. Stat.

Dear Mr. Smith:

You are City Attorney for the City of Flagler Beach and the city has requested my opinion on substantially the following questions:

1. Is the City of Flagler Beach authorized by section 212.055(2), Florida Statutes, to use funds collected pursuant to that statute to fund studies and construction of public capital projects relating to beach erosion control?

2. If the City of Flagler Beach is authorized to make such expenditures, is the Flagler County referendum ballot language sufficiently broad to permit the same expenditures?

In sum:

1. To the extent that the City of Flagler Beach proposes to construct beach control mechanisms that would satisfy the terms of section 212.055(2), Florida Statutes, the statute would authorize the city to use surtax funds to fund the construction of beach erosion control mechanisms and to fund the design and planning costs associated with the project.

2. Expenditures of the Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements are limited to those public projects and types of projects which involve roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities. Expenditures for design and planning studies which are undertaken in association with an authorized project are appropriate expenditures of surtax funds.

Initially, I would note that this office has concluded in a number of previous opinions that section 212.055(2), Florida Statutes, requires that a general description of the projects to be funded by a local government infrastructure surtax must be placed on the ballot to approve the imposition of

the surtax. Revenues from the surtax must be expended on projects that fall within the general description contained on the ballot.[1]

According to your letter, Flagler County conducted a referendum in which county electors authorized the county to adopt the "Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements" (the "Flagler Surtax"). The ballot language read as follows:

"To provide the funding for necessary public capital projects, Flagler County and its cities require additional revenue. The proposed revenue source is a ten (10) year 0.5 cent (0.5¢) per dollar sales surtax on taxable transactions occurring within Flagler County. These revenues would be used for funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County."

Flagler County subsequently adopted an ordinance implementing the surtax. The City of Flagler Beach is located within Flagler County and currently receives funds collected via the Flagler Surtax.

You have not provided this office with specifics of the "beach erosion control mechanisms" proposed to be constructed by the city and my comments will, therefore, be general in nature and based on your assertion that these are "public capital projects" and "fixed assets consisting of fixtures and fixed equipment."

Question One

Florida follows the general rule that taxes may be levied, assessed, and collected only as prescribed by statute.[2] Although a municipality is granted broad home rule powers by Article VIII, section 2(b), Florida Constitution, as implemented by section 166.021, Florida Statutes, its taxing power is derived from Article VII of the Florida Constitution, not Article VIII, Florida Constitution.[3] Thus, this office has stated that a county or municipality has no home rule powers with respect to the levy of taxes, but must be able to point to constitutional or statutory authority in exercising its taxing
power.[4]

Section 212.055(2), Florida Statutes, authorizes local governments to levy a discretionary sales surtax pursuant to an ordinance enacted by the members of the county governing body and approved by a majority of the county electors voting in a referendum on the surtax. The statute specifically addresses the purposes for which the surtax may be expended. Subsection (2)(d), states:

"The proceeds of the surtax authorized by this subsection and any accrued interest shall be expended . . . to finance, plan, and construct infrastructure; to acquire land for public recreation, conservation, or protection of natural resources; or to finance the closure of county-owned or municipally owned solid waste landfills that have been closed or are required to be closed by order of the Department of Environmental Protection. . . . The proceeds and any interest may not be used for the operational expenses of infrastructure . . .

1. For the purposes of this paragraph, 'infrastructure' means:

a. Any fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction, or improvement of public facilities that have a life expectancy of 5 or more years and any related land acquisition, land improvement, design, and engineering costs."

The terms "fixed capital expenditure" and "fixed capital outlay" are not defined for purposes of this section. Although the terms are not defined in Chapter 212, Florida Statutes, the term "[f]ixed capital outlay" is defined in Chapter 216, the statutory chapter that relates to state planning and budgeting. Pursuant to section 216.011(1)(p), Florida Statutes, a "[f]ixed capital outlay" is

"the appropriation category used to fund real property (land, buildings, including appurtenances, fixtures and fixed equipment, structures, etc.), including additions, replacements, major repairs, and renovations to real property which materially extend its useful life or materially improve or change its functional use and including furniture and equipment necessary to furnish and operate a new or improved facility. . . ."

An "[e]xpenditure" is defined in section 216.011(1)(m), Florida Statutes, to mean "the creation or incurring of a legal obligation to disburse money."[5]

In the absence of a definition of these terms for purposes of Chapter 212, Florida Statutes, a common understanding or definition of the component parts of these phrases may also be useful in determining their scope.[6] The term "fixed" is generally understood to mean something that is securely placed or established.[7] "Fixed capital" has been defined to mean the capital invested in fixed assets (land, buildings, machinery)[8] or capital that is durable in character (such as buildings and machinery) and can be used over an extended period of time.[9] Thus, section 212.055, Florida Statutes, authorizes the expenditure of the proceeds of the surtax authorized by this subsection to finance, plan, and construct "infrastructure" as that term is defined in the statute. That definition includes, by its terms, "land improvement, design, and engineering costs" associated with the construction, reconstruction, or improvement of public facilities having a life span of 5 or more years.

You have provided me with no details of what types of beach erosion control projects may be under consideration, but have characterized proposed beach erosion controls constructed by the city as "fixed assets consisting of fixtures and fixed equipment that would improve public beach facilities by countering beach erosion and materially extending the useful life of the City's public beaches[.]" You also indicate that these permanent beach erosion control mechanisms erected by the city "would certainly be intended to have a life expectancy of more than five years." To the extent that the projects themselves satisfy the statutory criteria, I am of the opinion that the projects themselves and studies which involve planning, property design and engineering costs may be funded with local government infrastructure surtax revenues.

In Attorney General Opinion 94-79, this office considered whether land improvement or design expenses could properly be purchased with the proceeds of the discretionary sales surtax provided for in section 212.055(2), Florida Statutes. The opinion considered the definitions of "fixed capital expenditure" and "fixed capital outlay" as well as "infrastructure" to determine that such items as fencing, swings, lumber for bleachers and lighting fixtures, and the materials for

landscape design and tree and shrubbery planting would not be appropriate expenditures of surtax proceeds. The opinion notes that these expenses are more in the nature of day-to-day operational expenses that may not be paid for with surtax funds. However, land improvement or design expenses that occur in conjunction with a fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction or improvement of public facilities, or an expenditure for such things as materials for landscape design may be purchased with the proceeds of the surtax when a new public facility is being built or an existing public facility is being improved. The opinion concludes that these funds may not be used independently for landscape design and improvement in the absence of a related fixed capital outlay.

As you have described the City of Flagler Beach erosion control project, the project would involve the construction of fixtures and fixed equipment and the studies and plans involved in the construction of such capital projects. Based on the language of section 212.055(2), Florida Statutes, and previous opinions of this office, it is my opinion that section 212.055(2), Florida Statutes, would authorize the city to use surtax funds to fund the construction of beach erosion control mechanisms and to fund the planning and studies involved in planning this infrastructure project and the design and planning costs associated with the project.

Question Two

As noted above, this office has previously concluded that section 212.055(2), Florida Statutes, requires that a general description of the projects to be funded by a local government infrastructure surtax must be placed on the ballot to approve the imposition of the surtax.[10] As required by section 212.055(2)(b), Florida Statutes, "[a] statement which includes a brief general description of the projects to be funded by the surtax and which conforms to the requirements of s. 101.161 shall be placed on the ballot[.]" Florida courts have recognized the general rule that tax revenues must be expended for the purposes for which they were collected, that is, funds raised by taxation for one purpose cannot be diverted to another use.[11] Thus, revenues from the surtax must be expended on projects that fall within the general description contained on the ballot.

Flagler County conducted a referendum in which county electors authorized the county to adopt the "Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements" (the "Flagler Surtax") with the following ballot language:

"To provide the funding for necessary public capital projects, Flagler County and its cities require additional revenue. The proposed revenue source is a ten (10) year 0.5 cent (0.5¢) per dollar sales surtax on taxable transactions occurring within Flagler County. These revenues would be used for funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County."

I understand your second question to be whether the ballot language "funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County" would encompass public capital projects relating to beach erosion control and the studies attendant to these projects.

Under the doctrine of *noscitur a sociis*, the meaning of statutory terms, and the legislative intent behind them, may be discovered by referring to words associated with them in the statute.[12] Under this doctrine, words take their meaning based on their context or association with other words in the statute. Thus, the phrase "public projects and improvements" must be read in reference to the word associated with it in the ballot language, *i.e.*, "roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities[.]"

To read the ballot language providing for funding "public projects and improvements" without the qualifying language following it on the ballot would appear to present so broad a categorization as to deny the voters any genuine notice of what might be funded by the bond referendum. That is, to read the ballot language "public projects and improvements" without limitations expressed in the "such as" clause would effectively authorize expenditures for a wide variety of projects without providing the voters with a reasonable idea of what these projects might be. To conclude that the use of a general description such as "public projects" is sufficient to advise the voters of the purposes for which the surtax is to be levied would effectively defeat the statutory purpose of requiring such a description.

The referendum language limits use of these surtax funds for "public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County." This office has been presented with no description of what types of projects may be under consideration. Thus, I cannot advise you whether the permanent beach erosion control mechanisms the City of Flagler Beach ultimately constructs would come within the scope of this referendum language. However, as was concluded in my response to Question One, to the extent that studies and design and planning costs are undertaken in conjunction with an authorized project, these expenses would constitute appropriate expenditures of surtax proceeds.

Thus, it is my opinion that expenditures of the Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements are limited to those public projects and types of projects "such as" roads, streets, pedestrian safety projects, motor vehicles, public buildings, and associated capital facilities. Expenditures for design and planning studies which are undertaken in conjunction with an authorized project are appropriate expenditures of local surtax funds.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Op. Att'y Gen. Fla. 00-06 (2000) (s. 212.055[2], Fla. Stat., requires that a general description of the projects to be funded by local government infrastructure surtax be placed on the ballot to approve imposition of surtax; revenues from surtax must be expended on projects falling within general description contained on ballot); *cf.* Op. Att'y Gen. Fla. 08-08 (2008).

[2] *See Walter E. Heller & Company Southeast, Inc. v. Williams*, 450 So. 2d 521 (Fla. 3d DCA 1984), *review denied*, 462 So. 2d 1108 (Fla. 1985); *State ex rel. Seaboard Air Line R. Co. v. Gay* , 35 So. 2d 403 (Fla. 1948); *Maas Brothers, Inc. v. Dickinson*, 195 So. 2d 193 (Fla. 1967).

[3] *See generally Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 317 (Fla. 1976). *See also City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1 (Fla. 1972) (municipality's power to tax is subject to the restrictions in Art. VII, s. 9, Fla. Const.). *And see* Art. VII, s. 9, Fla. Const., setting out taxing authority for counties.

[4] *See, e.g.,* Ops. Att'y Gen. Fla. 00-06 (2000) (county must expend revenues from surtax on projects within the general description on ballot); 90-23 (1990) (city may not provide for the rebate of ad valorem taxes collected on newly annexed property, in the absence of constitutional or statutory authority allowing such action); 87-45 (1987); and 84-65 (1984) (units of local government have no inherent power to impose taxes; the taxing power must be derived from the state).

[5] *And see* Op. Att'y Gen. Fla. 03-17 (2003), considering these definitions in relation to s. 212.055(2), Fla. Stat.

[6] Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. *See Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351 (Fla. 1984).

[7] *See* Webster's Third New International Dictionary "Fixed," p. 861 (unabridged ed. 1981); 36A C.J.S. "Fix" 583 ("Fixed" has been interpreted to mean established, firm, fastened, finally determined upon, immovable, securely placed); *and see* Webster's New Universal Unabridged Dictionary "fixed," p. 727 (2003) ("fastened, attached, or placed so as to be firm and not readily movable; firmly implanted; stationary; rigid").

[8] *See* Black's Law Dictionary "Fixed capital," p. 221 (8th ed. 1999).

[9] *See* Webster's Third New International Dictionary "Fixed capital," p. 861 (unabridged ed. 1981).

[10] *See, e.g.,* Op. Att'y Gen. Fla. 08-08 (2008) and Attorney General Opinions cited therein.

[11] *See, e.g., Supreme Forest Woodmen Circle v. Hobe Sound Co.*, 189 So. 249 (Fla. 1939); Ops. Att'y Gen. Fla. 00-29 (2000) and 77-26 (1977). *Cf. Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971). *And see Oven v. Ausley*, 143 So. 588, 589-590 (Fla. 1932), stating:

"When an enforced contribution is exacted from the people by the power of taxation, it is for a specific public purpose, and the fund so raised is a trust fund in the hands of the legal custodians of it. There may exist circumstances in which the fund may be diverted to some other lawful purpose than that for which it was raised. Appropriation of public moneys for certain public purposes involves the power of taxation, and when the money is taken from a fund created by the levy of a tax and applied to some other purpose it is equivalent to the levy of a tax for such purpose. The limitation upon the rate of taxation is for the protection of taxpayers and to secure

economy in the expenditure of public moneys."

And see Op. Att'y Gen. Fla. 02-55 (2002) (school capital outlay tax moneys collected to fund district school projects would not be an appropriate resource for funding projects on property no longer owned or controlled by the school district).

[12] *See Turnberry Isle Resort and Club v. Fernandez*, 666 So. 2d 254 (Fla. 3d DCA 1996); *Cepcot Corporation v. Department of Business and Professional Regulation, Construction Industry Licensing Board*, 658 So. 2d 1092 (Fla. 2d DCA 1995); Ops. Att'y Gen. Fla. 00-07 (2000) (while staff analysis refers to "invoices," that term should be construed in light of the other types of information referenced); 94-12 (1994); 90-55 (1990) (terms of section should be construed in connection with, and their meaning ascertained by reference to, other words and phrases of the section with which they are associated).