Tourist development tax use for design, engineering

Number: AGO 2021-02

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Ms. Melanie Marsh
Lake County Attorney
Post Office Box 7800
315 W. Main St., Suite 335 Tavares, Florida 32778

Dear Ms. Marsh:

On behalf of the Lake County Board of County Commissioners, you have requested an opinion addressing the following question:

> Whether a county that receives less than $10 million in tourist development taxes may use the tourist development tax revenue authorized under Section 125.0104(5), Florida Statutes, for design, engineering, and project development studies for trails and other authorized projects?

In sum:

Because the word “construct,” as used in section 125.0104(5)(b), does not subsume “design, engineering, and project development studies,” and Lake County (the “County”) does not receive “at least $10 million in tourist development tax revenue” in any given year—as required to use such revenue for the purposes enumerated in section 125.0104(5)(a)6—the County may not use tourist development tax revenue for design, engineering, and project development studies for trails and other authorized projects.

Background

In your letter, you describe the relevant circumstances as follows:

> In 1984, the County levied a two percent tourist development tax pursuant to Section 125.0104, Florida Statutes. The imposition of the tax was codified in the Lake County Code along with the required tourist development plan; the tourist development council was also created at that time. At the time the tax was first levied, the 1983 statute limited the uses of the tax as follows:
>
> > 1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, or auditorium.

2. To promote and advertise tourism in the State of Florida and nationally or internationally; or

3. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with chambers of commerce or similar associations in the county.

The 1983 statute did not use the terms "design", "engineering" [or] "project development studies" anywhere within its limited text.

In 2003, the County amended its Code to allow for the imposition of an additional two percent [tax] as authorized under Sections 125.0104(3)(d) and 125.0104(3)(l), Florida Statutes. The extra one percent tax authorized under subsection (3)(d) can be used for any purpose established under subsection (5), while th eone percent tax authorized under subsection (3)(l) can only be used for the purposes enumerated in that subsection, including to promote and advertise tourism, which is the use incorporated into the County's tourist development plan.

The County desires to expand its multi-use trail system which would also connect into the West Orange Trail, the Coast-to-Coast Trail, and the Seminole County [T]rail system upon completion of the Wekiva Parkway. There can be no doubt that the expansion of the County's multi-use trail will promote tourism not only in Lake County, but on a regional basis. There is also no question that a county can use tourism taxes for a multi-use trail according to AGO 12-38. In order to expand the trail system, however, planning studies, design and engineering must be completed first before the County can acquire the necessary right-of-way and construct the actual trail infrastructure. The County would like to use the tourism taxes to pay for these professional services, but it appears the statute may not allow that expenditure absent the receipt of $10 million or more in tourism development tax revenue for the prior year. The County currently receives approximately $3 million in tourism tax revenue on an annual basis. Therefore, clarification is sought from the Attorney General as to the allowable uses of the tourist development taxes.

You have also confirmed that the County has a population of less than 950,000.

Analysis

As a threshold matter, as indicated in your letter, if the County makes the legislative determination that expansion of its multi-use trail constitutes construction, extension, enlargement, or improvement of a nature center, then expenditure of Lake County tourist development tax revenues for such undertaking would likely be permissible under section 125.0104(5)(b), Florida Statutes.1 That subsection permits a county of less than 950,000 in population to use tourist development tax dollars “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 a not-for-profit corporation and open to the public.” However, the remaining question posed is whether

the term “construct,” as used in section 125.0104(5)(b), includes undertaking “planning studies” and obtaining professional “design and engineering” services.

When interpreting a statute, Florida courts look “first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary.”2 As applied here, the word “construct” means “to form, make, or create by combining parts or elements.”3 But, in interpreting any statute, a single subsection cannot be read in isolation; instead, a “statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.”4

As you pointed out in your letter, although section 125.0104(5)(b) does not specifically authorize funds to be spent for “related . . . design and engineering costs,” section 125.0104(5)(a)6 does. Notably, that subsection indicates that such professional services are “related” to a county’s use of funds to “acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance public facilities.”5

While “related” means “connected by reason of an established or discoverable relation,”6 to “include” means “to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle.”7 Although professional “design and engineering”8 services are “related” to construction activities, they are not “included” in them.9

Indeed, this observation is underscored by the Legislature having made separate provision for these professional services in section 125.0104(5)(a)6. If statutory authorization to expend tax revenue funds for “design and engineering costs” was already subsumed in authorizing the use of such funds to “acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance” public facilities, the Legislature would not need to address those costs separately—but it did.

In section 125.0104(5)(a)6, the Legislature authorized payment of costs to “construct, extend, enlarge, remodel, repair, [or] improve” enumerated projects separately from its authorization to pay the additional costs of acquiring “design and engineering” services incurred in connection with those undertakings. “To interpret [these provisions] to mean the same thing would mean that the Legislature had enacted redundant, useless legislation”10—and it “should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation.”11

Further, “when a statute enumerates the things upon which it operates, it is ordinarily construed as excluding from its operation all things not expressly mentioned.”12 In both section 125.0104(5)(b) and section 125.0104(5)(a)6, the Legislature has authorized expenditure of tourist development tax funds to “acquire, construct, extend, enlarge, remodel, repair, improve, [or] maintain” identified projects. But, whereas, in section 125.0104(5)(a)6, the costs of “related land acquisition, land improvement, design and engineering costs” are included as additional expenditures authorized in connection with such undertakings, in section 125.0104(5)(b), they are not.

Of importance here, in section 125.0104(5)(a)6, the Legislature has specified the conditions under which tax revenues can be expended for these additional activities, providing, in pertinent

part: “Tax revenues may be used for these purposes *only if the following conditions are satisfied*: a. In the county fiscal year immediately preceding the fiscal year in which the tax revenues were initially used for such purposes, at least $10 million in tourist development tax revenue was received[.]” (Emphasis added.) Had the Legislature wanted to include these professional costs as authorized regardless of the annual amount of revenue a county has received, it could easily have done so, by eliminating the annual tax revenue threshold condition contained in section 125.0104(5)(a)6.

You concluded your letter by stating policy reasons why it would be reasonable to allow the use of tourist development tax funds for planning, design, and engineering services. Regardless of the merits of such considerations, however, this office may not interpret section 125.0104 as authorizing additional categories of expenditures where, by its plain language, the statute does not.

Conclusion

Based on the foregoing, it is my opinion that the County may not use tourist development tax revenue for design, engineering, and project development studies for trails and other authorized projects. Should you still have concerns about the application of the statute, you might wish to seek legislative clarification.

Sincerely,

Ashley Moody
Attorney General

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1 *See* Ops. Att'y Gen. Fla. 2012-38 (2012) (“Thus, it appears that the expenditure of Walton County tourist development tax revenues for the maintenance, repair, improvement and expansion of a multi-use pathway used by tourists for biking, hiking, walking and running which is part of the recreational network of Walton County is permissible if these projects are determined by the county to satisfy the statutory requirement that they constitute an extension, remodeling or improvement of a nature center.”); 94-12 (1994) (“Given these common meanings of the terms “nature” and “center” and the use of the term “nature center” along with zoological parks and fishing piers, it would appear that the Legislature contemplated that tourist development tax revenues in counties with populations of less than 600,000 persons could be used to acquire property for a project similar to a nature trail or preserve open to the public.”) (footnote omitted). This office was not asked to consider—and, thus, this opinion does not address—whether the particular projects envisioned by the County would likely constitute construction, extension, enlargement, or improvement of a nature center.

2 *Edwards v. Thomas*, 229 So. 3d 277, 283 (Fla. 2017).

3 Webster's Third New International Dictionary 489 (1981).

4 *Acosta v. Richter*, 671 So. 2d 149, 153-54 (Fla. 1996); *accord Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001).

5 As also recognized in your letter, section 125.0104(5)(a)(6) applies only to counties receiving "at least $10 million in tourist development tax revenue" in the "county fiscal year immediately preceding the fiscal year in which the tax revenues were initially used for such purposes." Thus, Lake County cannot avail itself of this provision.

6 Webster's Third New International Dictionary 1916 (1981).

7 *Id.* at 1143.

8 For a discussion regarding the interrelationship between architectural services (regulated under chapter 481, Florida Statutes) and engineering services (regulated under chapter 471, Florida Statutes), *see Trikon Sunrise Assocs., LLC v. Brice Bldg. Co.*, 41 So. 3d 315 (Fla. 4th DCA 2010).

9 Thus, in section 489.105(3) of the definitions section of part I of chapter 489, Florida Statutes (regulating the construction industry), "contractor" is defined, in pertinent part, as "the person who is qualified for, and is only responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others *construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate*, for others or for resale to others." (Emphasis added.)

10 Op. Att'y Gen. Fla. 2010-29 (2010).

11 *Sharer v. Hotel Corp. of Am.,* 144 So. 2d 813 (Fla. 1962); *accord Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003) ("[S]ignificance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

12 Op. Att'y Gen. Fla. 99-70 (1999). (reasoning that "a listing of allowed expenditures for [local option fuel tax] revenues precludes use of such revenues for any other purpose" in concluding that such revenues could not be used to pay the operational cost for storm drainage, street lighting, and traffic signalization where the Legislature had, at that time, authorized use of such funds to pay the operational cost for bridges and public transportation, but not for storm drainage, street lighting, and traffic signalization).