

MEMORANDUM

**TO: BRADLEY ARNOLD
SUMTER COUNTY ADMINISTRATOR**

**FROM: GEORGE G. ANGELIADIS, ESQ.
THE HOGAN LAW FIRM, COUNTY ATTORNEY**

**RE: ANALYSIS OF F.S. §125.0104 AS RELATED TO AUTHORIZED
USES OF REVENUES GENERATED BY TOURIST
DEVELOPMENT TAX**

DATE: JUNE 7, 2011

Question Presented: Whether certain expenditures may be funded through the use of revenue generated by the Sumter County Tourist Development Tax (“TDT”) pursuant to the provisions contained within F.S. §125.0104(5)(a).

General Summary: F.S. §125.0104(5)(a) states that all tax revenues received by a county imposing the tourist development tax shall be used by that county **for the following purposes only:**

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 auditoriums, or museums that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public, within the boundaries of the county or subcounty special taxing district in which the tax is levied. Tax revenues received pursuant to this section may also be used for promotion of zoological parks that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public. However, these purposes may be implemented through service contracts and leases with lessees with sufficient expertise or financial capability to operate such facilities;
2. To promote and advertise tourism in the State of Florida and nationally and internationally; however, if tax revenues are expended for an activity, service, venue, or event, the activity, service, venue, or event shall have as one of its main purposes the attraction of tourists as evidenced by the promotion of the activity, service, venue, or event to tourists;
3. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county, which may include any indirect administrative costs for services performed by the county on behalf of the promotion agency; or;

4. To finance beach park facilities or beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access as those uses relate to the physical preservation of the beach, shoreline, or inland lake or river. However, any funds identified by a county as the local matching source for beach renourishment, restoration, or erosion control projects included in the long-range budget plan of the state's Beach Management Plan, pursuant to s. 161.091, or funds contractually obligated by a county in the financial plan for a federally authorized shore protection project may not be used or loaned for any other purpose. In counties of less than 100,000 population, no more than 10 percent of the revenues from the tourist development tax may be used for beach park facilities.

F.S. §125.0104(5)(b) goes on to state:

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.

Generally speaking, the Tourist Development Committee ("TDC") has requested guidance as to whether certain projects they would like to recommend can be funded using Tourist Development Tax revenue. Specifically, the TDC has identified the following questions with regard to potential projects:

1. With BOCC approval, can the TDC contract with a biologist for the purpose of examining local lakes and rendering an opinion on fishing quality, stocking ideas, mapping lakes within the county, providing a weekly fishing report, and assisting with a fishing tournament?
2. Can the TDC recommend the creation of a logo or recommend sponsoring a contest for the creation of logo? If so, could TDT revenue fund the cash prize?
3. Can the TDC recommend the investment of capital funds into facilities at boat ramps and parks (restrooms, picnic areas, walking paths)?
4. Does F.S. §125.0104(5)(a) limit the use of TDT revenues to "not-for-profit" organizations?
5. Can TDT revenue be used to create bird watching sites on public lands, with markers showing tourists what birds are in the area?

Discussion: As stated above, revenue generated from Tourist Development Taxes shall be used for the purposes enumerated in F.S. §125.0104(5)(a). However, the enumerated purposes contained in the statute are very broad. Therefore, guidance on these issues can be found in Florida Attorney General Opinions (“AGO”).

In AGO 2010-9, the Florida Attorney General was asked by Sumter County to provide an opinion as to whether Sumter County could use tourist development tax dollars to stock publicly accessible freshwater county lakes with native freshwater game fish, upon a proper legislative finding by the Board of County Commissioners that such an activity would promote tourism in the county.

The Attorney General determined that an expenditure of tourist development tax revenues pursuant to §125.0104, Florida Statutes, must be based on a determination by the governing body of the county that the activity **directly and primarily** promotes tourism. However, the Attorney General concluded that in light of the language of §125.0104(5)(a)4., Florida Statutes, requiring that the funds be used for projects involving the alteration or enhancement of the physical aspects of inland lakes and rivers, the use of tourist development funds for stocking a lake with game fish would appear to be questionable.

The opinion in AGO 2010-9 based its reasoning on AGO 90-55, wherein the Attorney General considered whether the statute would authorize the construction of artificial structures, such as sanitary facilities, upon a beach. The opinion concluded that the terms "beach improvement, maintenance, renourishment, restoration, and erosion control" read together related to the **actual, physical nature of the beach rather than authorizing the construction of artificial structures upon the beach or authorizing other activities which did not protect or enhance the physical nature of the beach.** Thus, the Attorney General concluded that improvements to the actual physical nature of the beach were authorized by section §125.0104, Florida Statutes; implying that the construction of artificial improvements were not authorized. However, it should also be noted that this analysis was conducted prior to the amendment of the statute, which now specifically refers to “beach park facilities”. Assuming the term “beach park facilities” would have been included in the analysis in AGO 90-55, the Attorney General may have come to a different conclusion.

In reaching this conclusion, the Attorney General ultimately determined that any expenditure would have to be supported by legislative findings that the use of funds was necessary to alter or enhance the “physical” aspects of the lake.

In furtherance of this point, the Attorney General in AGO 1992-66 stated that “The determination of whether the primary purpose of a particular project is to carry out the provisions in §125.0104, F.S., is one which must be made by the governing body of the county and not by this office.”

The question presented to the Attorney General in AGO 1992-66 was whether TDT revenue could be used to purchase all-terrain vehicles for use by the Flagler Beach Police Department and Fire Department for a dune erosion and protection patrol which would apprehend persons causing damage to the dunes, survey the beach for erosion problems, videotape dunes for evaluation after storm or other damage had occurred, protect citizens and tourists, and perform other municipal functions.

The Attorney General again cited AGO 90-55, and noted that the office had previously determined that the terms "beach improvement, maintenance, renourishment, restoration, and erosion control" must be read together to relate to the actual, physical nature of the beach. Thus, artificial structures are generally not contemplated as an approved purpose under §125.0104, Florida Statutes. It was noted, however, that under certain circumstances, dune walkovers or dune protection walkways had been recognized by the state to constitute a method of beach preservation and erosion control. Accordingly, there are instances where the governing body of a county could make the determination that the construction of such a walkover was to secure the physical integrity of the beach and thus was a valid method of erosion control which may be funded by TDT revenues.

The Attorney General reasoned that while the dune walkovers provided a convenient access to the beach for tourists and citizens, their basic, continuing function was to protect the dunes from erosion caused by foot traffic. To the contrary, the proposed ATV beach patrols appeared to be designed primarily to provide a monitoring system for activities on the beach, *i.e.*, protecting beachgoers, and therefore would not be a permitted purpose under §125.0104(5)(a)4. **Ultimately, however, the Attorney General concluded that whether the all-terrain vehicles serve to control erosion is a determination, based upon the proper legislative findings, which the governing body of the county must make.**

In AGO 2000-50, the Attorney General was asked whether tourist development tax revenues could be used to construct welcome signs and welcome islands at various entrances to the Gainesville metropolitan area in Alachua County. The Attorney General advised that if the Alachua County Board of County Commissioners made the requisite findings that such expenditure would promote tourism within the county, tourist development tax revenues could be used to construct welcome signs and welcome islands at various entrances to the Gainesville metropolitan area in Alachua County.

In drawing this conclusion, the Attorney General explained that while the expenditure of funds for signs welcoming tourists to the area and thanking them for visiting would not appear to be outside the realm of section 125.0104(5)(a)2., Florida Statutes, it is the governing body of the county that must make the factual determination of whether a particular facility or project is related to tourism and primarily promotes such a purpose. The Attorney General went on to state that **such a determination must follow appropriate legislative findings and due consideration of the specific needs and conditions of the particular locality, and that any such determination must show a distinct and direct relationship between expenditure of tourist development tax revenues and the promotion of tourism.**

Finally, In AGO 2000-25, the Attorney General was asked whether the Okeechobee County Tourist Development Council could use tourist development taxes to sponsor events for privately owned, for-profit businesses that may give significant exposure to Okeechobee County.

The Attorney General opined that tourist development funds may not be used to operate or promote a private sports facility; however, §125.0104(5)(a)2., Florida Statutes, allows such funds to be spent for a venue or an event that has as one of its main purposes the attraction of tourists. The Attorney General went on to state that the statute further provides that the best evidence of such intent is that the venue or event is promoted to tourists. Whether a particular venue or event is tourist related and furthers the purpose of promoting tourism, however, is a decision that the Attorney General indicated must be made by the governing body of the county.

Thus, the Attorney General concluded that the governing body of Okeechobee County could exercise its authority to decide, based upon appropriate legislative determination, that the promotion of an event has as its main purpose the attraction of tourists, for which tourist development funds under §125.0104, Florida Statutes, could be used.

Conclusion: The Attorney General has made it very clear that the determination of whether a particular facility or project is tourist related, and furthers such primary purpose, is a factual determination which must be made by the governing body of the county, founded upon appropriate legislative findings and due consideration of the peculiar and prevailing local conditions and needs.

In reviewing each of the inquiries propounded by the members of the TDC, it is clear that each of them has a rational nexus to potential tourist development. However, the question becomes, can the Sumter County Board of County Commissioners enumerate specific legislative findings which conclude that the expenditure of Tourist Development Tax revenue **directly and primarily promotes tourist development**? If this question can be answered in the affirmative, then the expenditure of the funds is appropriate under §125.0104.