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BOARD OF COUNTY COMMISSIONERS

TO: Honorable Chair and Members of the Board of County Commissioners
FROM: Morris Richardson, County Attorney
SUBJECT: Use of Tourist Tax Revenues for Lifeguard Services
DATE: August 22, 2023

QUESTION: Whether Brevard County may use tourist development tax funds pursuant to section 125.0104, Florida Statutes, to fund beach lifeguard services.

SHORT ANSWER: Lifeguard services may not be funded pursuant to section 125.0104(5)(a)5., Florida Statutes (the beach fund). However, lifeguard services may be funded pursuant to section 125.0104(5)(a)3., Florida Statutes (the marketing fund), and public facilities such as lifeguard towers may be funded pursuant to section 125.0104(5)(a)6. (the capital facilities fund).

ANALYSIS:

According to the Brevard County Fire Rescue Ocean Rescue Assessment presented to the Board of County Commissioners on May 23, 2023, between December 2022 and May 2023, 10 ocean-related fatalities occurred in Brevard County. Most of the drownings involved rip currents, and most of the victims were visitors to the area. None of the drownings occurred at a beach protected by a lifeguard.

Based on the Ocean Rescue Assessment, the Board directed that lifeguard services be expanded to provide full time towers at Boardwalk in Indialantic and at North Spessard Holland Park in the unincorporated county. The seasonal towers that were previously in service at these locations were placed in service at Juan Ponce De Leon Landing and South Spessard Holland Park, both of which were previously unguarded. The capital costs of the two new full-time towers and related equipment was \$86,400 each (\$172,800 total).

The annually recurring compensation and benefit costs associated with the new towers is \$378,793 each (\$757,586 total). The projected fiscal year 2023/24 costs for the lifeguard program, including contributions from participating municipalities, are depicted on a table attached as **Exhibit A**. The program is projected to cost \$3,548,271 in total, of which \$3,399,906 (95.82%) comes from the County general fund.

The Board requested a report from the County Attorney on whether revenues from the tourist development tax may be used to fund lifeguard services, given the clear and direct relationship between lifeguard services and tourism.

A. Funding Lifeguard Services Pursuant to Section 125.0104(5)(a)5., Florida Statutes (Beach Fund)

A 1990 Florida Attorney General Opinion¹ advised that Nassau County was not authorized by section 125.0104(5)(a)4., Florida Statutes, to use tourist development tax revenues to fund lifeguards on the beach. For years, the Brevard County Attorney's Office advised that tourist development tax revenues generally may not be used to fund lifeguard services, relying upon that opinion.

However, that Attorney General opinion – AGO 90-55 – was limited to the application of section 125.0104(5)(a)4., Florida Statutes to a specific set of facts. The opinion in AGO 90-55 does not extend to the use of tourist development tax revenues pursuant to other provisions of section 125.0104(5)(a).

In AGO 90-55, Nassau County specifically asked whether it could use tourist development tax revenues pursuant to section 125.0104(5)(a)4., Florida Statutes, to fund lifeguards on the beach. Thus, the Attorney General only applied that subsection to lifeguard services. At the time, that subsection authorized the use of tourist tax revenues as follows:

To finance 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.²

In Brevard County's adopted budget plan, this category of authorized tourist development tax expenditures is referred to as the "beach fund" and represents thirty percent of the net revenue from the first two "pennies" and sixty-five percent of the third "penny" of the tourist tax.³

¹ Fla. AGO 90-55 (July 23, 1990).

² This subsection was subsequently amended, renumbered to s. 125.0104(5)(a)5., and now reads:

To finance beach park facilities, or beach, channel, estuary, or lagoon improvement, maintenance, renourishment, restoration, and erosion control, including construction of beach groins and 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, channel, estuary, lagoon, or inland lake or river....

³ Sections 102-119(3)b. and 102-119(4)a., Brevard County Code of Ordinances.

The Attorney General noted that the terms “beach improvement, maintenance, renourishment, restoration, and erosion control” relate to the actual, physical nature of the beach and do not authorize activities which do not protect or enhance the physical nature of the beach. Therefore, the Attorney General concluded that providing lifeguards for Nassau County beaches did not constitute “beach improvement, maintenance, renourishment, restoration, and erosion control” within the contemplation of s. 125.0104(5)(a)4., F.S., such that tourist development tax revenues may be used to fund such services.”

Limited to the very specific question it addressed, AGO 90-55 was well reasoned. However, physical beach enhancement projects are but one authorized use of tourist tax revenue under section 125.0104. Moreover, as AGO 90-55 acknowledged, “the determination as to whether a particular expenditure satisfies the requirements of s. 125.0104, F.S., is the responsibility of the governing body of the county and cannot be delegated to [the Office of the Attorney General].” Thus, this opinion also addresses whether Brevard County may use tourist tax revenues to fund lifeguard services pursuant to other provisions of section 125.0104.

B. Funding Lifeguard Services Pursuant to Section 125.0104(5)(a)3., Florida Statutes (Promotion/Attraction of Tourists)

Section 125.0104(5)(a)3. authorizes the use of tourist tax revenues:

To promote and advertise tourism in this state and nationally and internationally; however, if tax revenues are expended for an activity, service, venue, or event, the activity, service, venue, or event must 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[.]⁴

In Attorney General Opinion 2017-06, Walton County’s Tourist Development Council asked whether the county may use tourist development tax proceeds under section 125.0104(5)(a)3. to fund, in whole or in part, a transit system operated by a private company.⁵ The Attorney General opined that tourist tax revenues may be used for specific tourist-oriented transportation services based upon a showing that one of the main purposes of each service provided is to attract tourists. The tourist tax revenues could not be used to fund a public transit system that would only incidentally benefit tourists. Rather, there must be a clear and direct relationship

⁴ At the time the 1990 Attorney General opinion was issued, this provision was numbered (5)(a)2., and only authorized the expenditure of tourist development tax revenue “to promote and advertise tourism in the State of Florida and nationally and internationally.” In recognition of the fact that the provision of services and activities may attract tourists and beneficially promote tourism to an area, the Legislature amended this subsection in 1996 to make activities, services, venues, and events eligible for tourism tax funding.

⁵ Fla. AGO 2017-06 (July 23, 1990).

between the promotion of tourism and the transportation service being offered (for example, a shuttle connecting hotels with county tourist attractions).

The Board of County Commissioners could reasonably determine that one of the main purposes of providing lifeguard services is to attract tourists to Brevard County.⁶ The Board could also find that lifeguard services do not incidentally benefit tourists, but rather, a clear and direct relationship exists between lifeguard services and the promotion of tourism.⁷ The promotion of lifeguard services to tourists places these services squarely within the provisions of section 125.0104(5)(a)3.⁸

In Brevard County's adopted budget plan, this category of authorized tourist development tax expenditures must receive at least 25 percent of the net revenue from the first two "pennies," and 100 percent of the net revenue from the fifth "penny" of the tourist tax.⁹ At its August 8 meeting, the Board of County Commissioners directed that certain funding previously allocated to tourist-oriented cultural events be redirected into the marketing fund for use towards lifeguards and marketing Brevard County as a destination with safe beaches. This would allow the County to fund a significant portion of the cost of providing lifeguard services from tourist development tax revenue, without reducing the amount previously designated for the tourism marketing campaign. The Tourism Development Office projects that the available revenues can fund 20 percent of the lifeguard program costs (\$709,654).

A table depicting the lifeguard program cost allocation if the Board directs 20 percent program funding from the tourist development tax marketing fund is attached as **Exhibit B**.

⁶ For example, in a recent survey the Tourism Development Office asked 500 people from 10 metropolitan areas what motivates them to select the beaches in Florida for a vacation. When asked why they select certain beaches, beach amenities were the third most important factor. 31.8% of the people surveyed prioritized beaches protected by a lifeguard.

⁷ Unlike law enforcement functions, lifeguard services are not in the nature of a general governmental function which is owed to the public at large. *Cf.* Fla. AGO 90-14. In Brevard County, beach lifeguard activities are a specialized service that tend to be concentrated in high tourist areas.

⁸ See, e.g., <https://www.visitspacecoast.com/blog-post/beach-safety-on-the-space-coast>; Tourism Development Office Executive Director Peter Cranis recently explained that his office plans to develop "new creative messages that will highlight the beaches up and down the Space Coast, including the importance of swimming where there are lifeguards." Berman, D. (2023, August 14). *Here's how office of tourism plans spend \$14 million to Market Space Coast to visitors.* Florida Today. <https://www.floridatoday.com/story/money/business/2023/08/14/office-of-tourism-plans-to-spend-record-14m-market-space-coast/70548961007/>

⁹ Sections 102-119(3)a. and 102-119(6), Brevard County Code of Ordinances.

C. Funding Lifeguard Towers and Related Costs Pursuant to Section 125.0104(5)(a)6., Florida Statutes (Public Facilities)

Section 125.0104(5)(a)6. authorizes the use of tourist tax revenues:

To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance public facilities within the boundaries of the county or subcounty special taxing district in which the tax is levied, if the public facilities are needed to increase tourist-related business activities in the county ... and are recommended by the county tourist development council created pursuant to paragraph (4)(e). Tax revenues may be used for any related land acquisition, land improvement, design and engineering costs, and all other professional and related costs required to bring the public facilities into service. As used in this subparagraph, the term “public facilities” means major capital improvements that have a life expectancy of 5 or more years, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, and pedestrian facilities....

This subsection could be relied upon to authorize funding public facilities in the form of lifeguard towers, as well as related capital expenditure costs necessary to bring the lifeguard towers into service, and the maintenance and operation of the lifeguard towers. In Brevard County’s adopted budget plan, this category of authorized tourist development tax expenditures is limited to “up to 35 percent” of the net revenue from the first two “pennies” of the tourist tax.¹⁰

The use of tourist tax revenues for public facilities under this subsection requires, among other things, that the public facilities are recommended by the Tourist Development Council, that the Board approves the use by a vote of at least two-thirds of its membership, and that no more than 70 percent of the cost of the proposed public facilities will be paid for with tourist development tax revenues.

¹⁰ Section 102-119(3)c., Brevard County Code of Ordinances.