



**AGENDA REPORT
November 7, 2017**

did not approve

SUBJECT:

Request that the Brevard Delegation amend Florida Statutes to allow the use of the Tourism Development Tax to prevent and treat pollution within the Indian River Lagoon

FISCAL IMPACT:

None

DEPT/OFFICE:

District 3

REQUESTED ACTION:

The Board is requested to approve the attached resolution, thereby requesting amendment of Fla. Stat. § 125.0104

SUMMARY EXPLANATION and BACKGROUND:

On October 27th, 2017, County Attorney Scott Knox, in response to questions raised by several Commissioners, gave his professional opinion that revenues from the Tourist Development Tax cannot be used for the restoration of the Indian River Lagoon due to the lack of inclusion of "estuaries" as a permitted expenditure under Florida Statutes, and the definitional distinction from "rivers," a permitted use.

Additionally, he stated his opinion that Fla. Stat. § 125.0104 would not be interpreted to allow spending on infrastructure designed to prevent pollution of the Indian River Lagoon, even if the pollution has a deleterious impact on tourism in the region.

The Indian River Lagoon is critical to tourism in the region. It is a major attraction for people of all walks of life in itself, and acts a foundation for local tourism in general. The continued deterioration of the lagoon, in large part due to inadequate infrastructure, is preventable. This resolution would provide an additional mechanism for the County to support to this effort.

ATTACHMENTS:

Description

- D [Resolution](#)
- D [County Attorney Opinion](#)

REVIEWERS:

Department	Reviewer	Action
District 3	Tobia, John	Approved
County Manager	Abbate, Frank	Approved



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November 8, 2017

MEMORANDUM

TO: Commissioner John Tobia, District 3

RE: Item VI.F.2., Resolution Amending Florida Statute 125.0104, Allowing the Use of Tourism Development Tax to Prevent and Treat Pollution Within the Indian River Lagoon

The Board of County Commissioners, in regular session on November 7, 2017, denied request for resolution amending Florida Statute 125.0104, allowing the use of Tourism Development Tax to prevent and treat pollution in the Indian River Lagoon.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe, Deputy Clerk

cc: County Manager

Resolution 17-____

REQUEST THAT THE BREVARD DELEGATION INTRODUCE LEGISLATION TO AMEND FLORIDA STATUTES TO ALLOW THE USE OF THE TOURIST DEVELOPMENT TAX TO PREVENT AND TREAT POLLUTION WITHIN THE INDIAN RIVER LAGOON

WHEREAS, 71% of the Indian River Lagoon is located in Brevard County; and

WHEREAS, the citizens of Brevard County have repeatedly made their wish of a clean and safe lagoon clear; and

WHEREAS, the Indian River Lagoon is an estuary of critical importance to the local, regional, and national ecology; and

WHEREAS, fishkills are frequently occurring within the Indian River Lagoon, including severe fishkills in 2016 and 2013; and

WHEREAS, algae blooms, including those which have a direct impact on the health of citizens and visitors of Brevard County, have occurred in 2016, 2015, 2013, 2012, and 2011; and

WHEREAS, pollution of the Indian River Lagoon has been a major contributor to the loss of more than 60% of seagrass beds; and

WHEREAS, it has been determined by the County Commission that the voter-approved "Save Our Lagoon" tax revenue should not act to reduce other allocations made to protect the Indian River Lagoon; and

WHEREAS, events such as algae blooms and fishkills have a deleterious effect on local quality of life and tourism; and

WHEREAS, County Attorney Scott Knox issued an opinion that Tourist Development Tax revenue cannot be used on infrastructure upgrades designed to prevent pollution of the Indian River Lagoon, regardless of its effect on tourism in Brevard County; and

WHEREAS, County Attorney Scott Knox has opined that Tourist Development Tax revenue cannot lawfully be allocated to clean up and restore the Indian River Lagoon, even if the state of the Lagoon is detrimental to tourism in the area, because it is an "estuary" rather than a "river" within the meaning of Fla. Stat. § 125.0104(5)(a)(5); and



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BOARD OF COUNTY COMMISSIONERS

TO : Curt Smith, Chairman and Members of the Board of County Commissioners
FROM: Scott L. Knox, County Attorney 
RE : Use of tourist development tax for sewer improvements
DATE : October 27, 2017

Question: Can Tourist Development Tax revenues be used for sewer system improvements?

Short Answer: No, TDT revenues can only be used for the specifically enumerated purposes listed in section 125.0104, Florida Statutes.

Commissioners:

Several Commissioners have asked whether or not Tourist Development Tax revenues can be used for infrastructure, specifically sewer system improvements that would help prevent discharges of sewage into the Indian River Lagoon (IRL). More than one Commissioner has raised the question in the context of a Florida Today article by Dave Berman dated October 24, 2017. The article reported a statement claiming the Tourist Development Tax can be used to improve sewer systems because a section in the TDT statute purportedly allows TDT funds to be “used 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*.”¹

Before exploring the legal issues raised by the question posed above, the Commission should note that prior to the Board’s adoption of a resolution placing the ½ cent IRL sales tax on a referendum ballot passed by the County’s citizens, this office thoroughly explored the TDT as an option for funding cleanup and restoration of the IRL for the simple reason that no referendum would have been required under the TDT statute. In exploring the TDT option, this office focused heavily on the provision quoted in the Florida Today article. Our research included a

¹ Section 125.0104(5)(a)5., Florida Statutes

review of Federal and State statutes, rules, case law, attorney general opinions, scientific opinions and material, as well as Oxford and Webster dictionary definitions of terms used in the statute in an effort to determine if a beach park facility, beach, inland lake or *river* would include the Indian River Lagoon estuary, thereby allowing the use of tourist development tax revenues for infrastructure improvements such as the sewer system improvements discussed in the Florida Today article.

The Attorney General has opined that Tourist development tax revenues may be used to physically enhance or protect *inland lakes* and *rivers* to which there is public access² and to finance the removal of hydrilla and other water weeds from the *inland lakes* and *rivers* if county determines that such expenditure is primarily related to tourism in the county³. However, after exhaustive research, this office could find no statute, rule, case, attorney general's opinion, scientific material or definition that could be viewed as including a "lagoon" or "lagoon estuary" as an inland lake or river, beach park facility or beach under the TDT statute cited by the Attorney General in the foregoing opinions.

Courts would look at "the plain and ordinary meaning" of "river," "lake," beach and park, as used in the statute to interpret that statute.⁴ Using that approach, this office was forced to discard any notion that the Tourist Development Tax could be used for restoration or cleanup of the Indian River Lagoon because a "lagoon" is not a river, lake or beach. Though the IRL name includes the word "river," an Oxford dictionary check of the common meaning of the word "river" is "a large natural stream of water flowing in a channel to the sea, a lake, or another river."⁵ A lagoon, on the other hand, is defined as "a stretch of salt water separated from the sea by a low sandbank or coral reef; or in North America, as a small freshwater lake near a larger lake or river; or, ironically, "an artificial pool for the treatment of effluent or to accommodate an overspill from surface drains during heavy rain."⁶ Likewise, the Merriam Webster Online Dictionary defined "lagoon" as "a shallow sound, channel, or pond near or communicating with a larger body of water or a shallow artificial pool or pond (as for the processing of sewage or storage of a liquid)."

A lagoon cannot be shoe-horned into the statute as a river or, using that same definitional approach, as any other of the uses enumerated in the TDT statute.

² Florida Op. Atty. Gen. 91-62, Aug. 27, 1991 (1991 WL 528193).

³ Florida Op. Atty. Gen. 90-59, July 27, 1990 (1990 WL 509069).

⁴ Courts generally interpret the words of a statute by giving them their plain and ordinary meaning. *Maxwell v. State*, 110 So.3d 958, 961 (Fla. 4th DCA 2013); *OB/GYN Specialists of Palm Beaches, P.A. v. Mejia*, 134 So. 3d 1084, 1088 (Fla. Dist. Ct. App. 2014)

⁵ <https://en.oxforddictionaries.com/definition/river>

⁶ <https://en.oxforddictionaries.com/definition/lagoon>

The TDT statute, at its core, is a law relating to taxes. 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.⁷ In the case of tourist development tax revenues, expenditures are limited to the purposes expressly set forth in the TDT statute, as the Attorney General found in AGO 88-49, in which the AGO advised Monroe County that the expenditure of tourist development tax revenues was limited to those purposes set forth in the statute and other uses are excluded.⁸

The Courts have also held that where a statute enumerates the things upon which it is to operate, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned.⁹ An example of how the Attorney General has applied that judicial principle to the TDT statute is AGO-2008-26, where the AGO stated: "Section 125.0104(5)(a)1., Florida Statutes, refers exclusively to 'convention centers.' In the absence of any indication that the Legislature intended such facilities as public lodging and restaurant facilities to be included within the scope of the term 'convention center' as it is used in section 125.0104(5)(a)1., this office cannot read the statute so expansively." Likewise, the Attorney General has applied the same principle to find that Tourist development tax revenues may not be used for repair, construction, and improvement of boat ramps and parking facilities,¹⁰ and that, *even if tourist-related*, parks and picnic areas are beyond and outside the scope of the limitations and terms of the facilities enumerated in this section, and expenditure from the tourist development tax revenues therefor is unauthorized.¹¹

The TDT statute does not have a provision allowing the use of TDT revenues for restoration or cleanup of a lagoon, or for the construction of sewer improvements that might be required for cleanup of a lagoon. The list of specific types of uses listed in the section of the statute quoted in the Florida Today article does not include "lagoon," the general term "water bodies" or even the

⁷ 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).

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).

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⁸ See also: *Thayer v. State*, 335 So.2d 815, 817 (Fla.1976).

⁹ 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.

¹⁰ Florida Op. Atty. Gen. 91-62, Aug. 27, 1991 (1991 WL 528193).

¹¹ Florida Op. Atty. Gen., 83-18, March 17, 1983 (1983 WL 163729).

general term “recreational facility,” any one of which would have allowed the use of the TDT for cleanup and restoration of the lagoon. That was the Legislature’s choice.

Therefore tourist development tax revenue expenditures are limited to the purposes expressly set forth in the TDT statute. The Legislature can change the list of specific uses with a simple amendment to the statute, as they did for beach park facilities which, the AGO determined to be outside the scope of those specific statutory uses authorized for expenditure of TDT funds before the statute was amended.¹²

That being said, there is a general use of TDT funds specified in several sections of the TDT statute. Revenues generated by the TDT can also be used to “promote tourism.”¹³ The Attorney General has opined that, though an expenditure of tourist development tax revenues pursuant to §125.0104 must be based on a determination by the governing body of the county that the activity directly and primarily promotes tourism, however “in light of the language of §125.0104(5)(a)4. requiring that these 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.”¹⁴ In contrast, the Attorney General has also opined that a county commission may use tourist development revenues to purchase an outparcel of beachfront land as an addition to a larger, existing public preservation and recreation area if the commission finds that the expenditure will either promote tourism in the county or improve, maintain, or restore the beach park.”¹⁵

However, the test the Attorney General has consistently used to draw the line between authorized uses and unauthorized uses under the TDT statute is that the project must meet two statutory criteria: 1) the project must primarily promote tourism and 2) the project must be enumerated in the TDT statute.

Examples are an Attorney General’s Opinion that section 125.0104(5)(b) authorizes a county with a population of less than 750,000 to expend tourist development tax revenues for the construction of a nature center (an authorized statutory project) which may contain a boat ramp and an elevated platform for observation of birds and the landscape, *when the county makes the appropriate legislative determination that such project relates to tourism and primarily promotes such a purpose.*¹⁶ Likewise, the Attorney General has opined that “the following

¹² Nassau County was not authorized by Subsection (5)(a)4 of this section to use tourist development tax revenues to construct beach parks, fund additional law enforcement patrols or lifeguards on the beach, or build or maintain sanitary facilities on or near the beach. Florida Op. Atty. Gen. 90-55, July 23, 1990 (1990 WL 509074).

¹³ See: Section 125.1014(5)(a)3.; (3)(1); (3)(n)2., Florida Statutes

¹⁴ Florida Op. Atty. Gen., 2010-09, March 3, 2010 (2010 WL 737333)

¹⁵ Florida Op. Atty. Gen., 2001-42, June 19, 2001 (2001 WL 689691).

¹⁶ Florida Op. Atty. Gen., 2015-14, September 29, 2015 (2015 WL 5793112).

facilities, if tourist related or designed and maintained **primarily** for the purpose of furthering the advancement, improvement, and promotion of tourism, fall within the purview of the facilities enumerated in this section and thus may be constructed with funds derived from the tourist development tax: a multi-purpose building to be utilized as a convention center and exhibition hall, a horse show arena with stables, a softball tournament center, a tennis and aquatic center, and a multi-purpose field or stadium.”¹⁷

Based upon the above-referenced principles of statutory interpretation and Attorney General opinions, it is the opinion of this office cleanup or restoration of a lagoon is not a specifically enumerated use under the TDT statute. Moreover, sewer system improvements—even if they have the effect of cleaning up or restoring the IRL and can be seen as important to the promotion of tourism—are primarily related to public health, not tourism, and cannot be funded with the TDT.

¹⁷ Florida Op. Atty. Gen., 83-18, March 17, 1983 (1983 WL 163729).