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MEMORANDUM

TO : Chairman Zonka and Commissioners
Brevard County Board of County Commissioners

FROM : Daniel F. Mantzaris

DATE : July 17, 2022

RE : Tourist Development \$30 Million Grant agreement with
DAD 1300 N. Atlantic Cocoa, LP
(BCC 7/19/22 Meeting Agenda Item I.1)

This memorandum is submitted by the above law firm as counsel for Cocoa Beach Motel, Inc. d/b/a Radisson Resort at the Port and in opposition to the subject grant agreement and its approval by the Board of County Commissioners.

I. \$30 Million Grant Agreement with DAD 1300 N. Atlantic Cocoa, LP.

The subject Grant Agreement if approved would commit Brevard County to a grant of up to \$1,000,000 annually to DAD 1300 N. Atlantic Cocoa, LP. or its successor entity (hereinafter DAD) as part and conditioned upon DAD's construction and operation of a 800,000 square foot mixed-use destination resort, including a hotel, 120,000 square feet of convention space, a spa and fitness center, multiple food and beverage and retail venues and a parking facility. The proposed agreement commits the County to fund the grant annually for thirty years for a total grant commitment of up to \$30,000,000. The "grant" would be funded by a rebate from the County of the Tourist Development Tax collected by DAD's destination resort from taxpayers staying at the resort and/or using the facilities.

The Recitals incorporated into the proposed agreement include statements of i) the need for a high-end resort and convention center ii) that the grant funds will be used solely to promote DAD's destination resort iii) that the promotion of economic development is an appropriate public purpose and therefore the county may provide "direct financial

incentives” to a business from the county and iv) concludes that the proposed “grant” to the destination resort and convention center will promote economic development, job growth and a new business in Brevard County. Although, the recitals statement and the conclusion are laudable goals for the County and arguably meet the constitutional requirement to only use public funds (taxes or otherwise) for public purposes, the proposed use of Tourist Development Tax funds as either a straight grant or a rebate of funds collected by a specific private entity is contrary to *Florida Statute 125.0104* and Brevard County Code Chapter 102, Article III, *Tourist Development Tax*.

II. Inappropriate and Unauthorized Use of Tourist Development Tax

The proposed agreement creates a unique and extraordinarily special benefit for a private entity to assist in the financing, construction and operation of a private for-profit business venture. Again, the proposed project includes a hotel, convention center, restaurants, retail uses and a parking facility, all designed to serve the tourists that come to the destination for the financial benefit of the private developers and hotel operators. Brevard County’s Tourist Development Tax is authorized by *F.S. Section 125.0104* and the tax funds can only be imposed, collected and used in strict accordance with Florida Law.

Again, among the stated purposes of the DAD grant are:

WHEREAS, GRANTEE is offering GRANTOR an opportunity to provide Tourist Development Tax to fund advertising to promote a world-class, state-of-the-art Convention Center to be constructed and operated by the GRANTEE in order to fill a missing convention center element in the tourist industry of Brevard County; and
(Recital Page One of Agreement)

WHEREAS, the Grant will be solely used for the promotion and advertising of the Westin Cocoa Beach Resort and Spa and the Space Coast with the main goal being the attraction of tourists; and
(Recital Page Three of Agreement)

Florida Law and Chapter 102, Article III of the Brevard County Code, prohibit the use of tourist development tax to fund capital and other improvements for privately owned facilities. The scheme documented by this proposed agreement skirts the legal prohibitions to provide capital for this project, by identifying it as promotional, marketing and advertising funds to be paid to DAD as “reimbursement” for the taxes that it will collect when the destination resort and convention center is open. The County’s Code and State Law, authorize the use of Tourist Development Tax for such purposes and in fact it is referenced in several parts of the statute with regard to each of the incremental taxes that Brevard County has authorized. The law, however, requires that the tax revenues be

expended only for programs whose main purpose is to attract tourists. The language used in the statute and which has been incorporated into the County Code is consistent and reads as follows:

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. F.S. Sec. 125.0104.

The Florida Attorney General has opined that tourist development tax funds may not be used for a privately owned sports facility, however, they may be used to promote an activity, venue or service if the main purpose of the activity, venue or service is to promote tourism. (See Florida AGO 2000-25).

As the law is clear that these tax funds cannot be used to fund the construction or operation of a private facility and DAD's development plan is to construct a multi-use destination resort facility as a for profit venture, it cannot reasonably be argued that the main purpose of the grant agreement and the transfer of funds to DAD is to promote tourism. In other words, the clear intent is to assist DAD in the funding of its privately-owned facilities. This intent is evidenced by the following obvious facts and statements inherent in the proposed transaction:

1. As set forth above, the funds are to be used solely for promotion and advertising of the Westin Cocoa Beach Resort.
2. The agreement commits the county to rebate up to \$1,000,000 of anticipated tax funds based on a project that has not been constructed and a determination that there is a market need for the construction of a high-end hotel and convention center.
3. A review of the proposed agreements and changes offered by the attorney for DAD includes comments and additions to ensure that a potential lender for the project will be able to assume the right to receive the \$1,000,000 annual rebate in the event that DAD defaults on its loans. This is a clear indication that although, the funds may not be pledged to repay any DAD loan obligations, the grant will serve as a credit enhancement for DAD and likely a reduced interest rate for the benefit of a private entity.
4. The proposed project is a high-end destination resort with hotel rooms, restaurants, retail and spa facilities, a convention center and parking facility obviously intended to serve all of the tourist-related needs of any visitors to Brevard County. In other words, its main purpose is to generate tourists and

paying customers not for Brevard County but for the self-contained destination resort.

5. The “grant” is not a grant at all, as it is a repayment to DAD of the anticipated Tourist Development Tax it will collect once operating and thus is a transfer of taxpayer dollars to a private entity to be used for extremely vague purposes (see Exhibit B to the Agreement) at the discretion of DAD and without any immediate oversight.

As stated by the Attorney General, Florida Law permits the use of Tourist Development Tax for marketing and promotion purposes with an appropriate finding as to the value of the program for the benefit of tourism in the County. In that context the authorized use, however, was clearly contemplated to be on a specific event, service, venue basis and not as a recurring commitment over thirty years as is proposed in this grant. Not surprisingly, the agreement does not have any milestones or measurements to evaluate the success of any advertising or marketing approaches for the county, or any specific requirements as to the amount of funds DAD will spend in support thereof. Additionally, the proposed payment of tax funds as a reimbursement for funds collected, but not paid, by DAD is similar to a tax increment financing scheme and not authorized by Florida Law. Finally, the proposed grant agreement creates a precedent for every Tourist Development Tax collector to seek a similar arrangement to use for purposes of marketing, advertising and promoting its particular venue.

III. Grant Agreement is a Substantial Change to the Tourist Development Plan.

If the Board disagrees with the above analysis and finds that the grant agreement is a lawful use of Tourist Development Taxes, clearly the unique scheme proposed in the grant agreement is not contained or contemplated in the tourist development tax budget plan previously approved by ordinance of this Commission. Although the plan does include allocation of collected revenues for various budgeted purposes, it does not approve or authorize a long-term annual commitment of funds to DAD or any other collector of the tax based on the amount collected. In other words, the agreement commits future county commissions to appropriate funds which contradict the current appropriations in the approved budget plan of the advisory development council.

Section 102-119(3)(f), states as follows with regard to the adopted plan of the advisory tourist development council:

Pursuant to F.S. Sec. 125.0104(4)(d), the above-stated plan may not be substantially amended except by ordinance enacted by an affirmative vote of a majority plus one additional member. Of the board. The council shall, from time to time, make

recommendations to the board for the effective operation of the special projects or for uses of the tax revenue.

By virtue of the foregoing, if the Commission believes the proposed “grant” agreement is authorized by applicable law, as it is a significant change to the approved budget plan for the tourist development tax, that approval will require the affirmative vote of a majority of the commission plus one. As we understand there is currently an open seat on the commission, therefore an approval of this grant agreement will require a unanimous vote of the four commissioners.

IV. Conclusion.

The proposed grant agreement is an unauthorized and prohibited use of the Tourist Development Tax. It has been conclusively determined that tourist development tax cannot be used to fund privately owned projects. Regardless of how it is presented, the subject project has not been constructed and the documents and the funding analysis clearly establish the grant as alternative funding of capital improvements that will be privately owned. Further, the proposed grant agreement is a substantial change to the existing tourist development tax budget and to be approved requires a unanimous vote of the four current commissioners.

Based on the foregoing on behalf of Cocoa Beach Motel, Inc. d/b/a Radisson Resort at the Port, we respectfully request that the board deny the request to approve the proposed grant agreement.

cc: Christine M. Schverak, Interim County Attorney