



BOARD OF COUNTY COMMISSIONERS

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Inter-Office Memo

TO: Commissioner John Tobia, District 3, Brevard County

CC: Commissioner Rita Pritchett, District 1
Commissioner Curt Smith, District 4
Commissioner Kristine Zonka, District 5
Frank Abbate, County Manager
Tourist Development Council

FROM: Christine M. Schverak, Interim County Attorney

SUBJECT: Use of Tourist Development Tax Revenue and Impact on Tourist Development Plan

DATE: July 18, 2022

Question 1: Regarding the grant attached as Item I.1. on the July 19, 2022 Board of County Commission (BOCC) agenda, are Tourist Development Tax (TDT) funds authorized to be expended for the grant's purpose?

Short Answer 1: The Board of County Commissioners may find that an expenditure of TDT revenue for this grant is an authorized use of TDT funding.

Question 2: Does this grant require an amendment to the Tourist Development Plan, or may it be passed by a majority vote of the Board of County Commissioners?

Short Answer 2: As written, this grant does not require an amendment to the Tourist Development Plan and may be approved by a majority vote of the Board of County Commissioners.

Analysis Question 1:

The Board of County Commissioners may find that an expenditure of TDT revenue for this grant is an authorized use of TDT revenue. The following factors are relevant in determining whether Brevard County TDT revenue may be expended on this grant: a) the proposed use of the revenue; b) whether the proposed use of the TDT revenue is an authorized use under the Local Option Tourist Development Act at Section 125.0104, Florida Statutes (hereafter the Act); c) whether the proposed use of the TDT revenue is an authorized use under the Brevard County's Tourist Development Plan at section 102-119 of Brevard County's Code of Ordinances (hereafter the Code); and d) whether the Board of County Commissioners have made the required legislative findings in approving the Grant. Each factor will be addressed in turn.

a) Factor One: Proposed Use of the Revenue.

The Grant states it will be used for the “promotion and advertisement of the privately-owned Convention Center in the State of Florida, nationally and internationally,”¹ along with the “remainder of the Project”² and “which marketing shall include references to Cocoa Beach and Florida’s Space Coast, as part and parcel of the promotion and advertisements of its Project.”³ In the definitions, the Project is defined as follows:

Grantee agrees and commits to undertake the construction of the Project which consists of approximately 800,000 square foot (in total) of mixed-use destination resort anchored by a 4.5-star, 502-key Westin hotel; approximately 120,000 square feet of event space including a state-of-the-art Convention Center venue, indoor, and outdoor event space; multiple food and beverage venues; spa and fitness center; retail; and a multistory parking garage which accommodates approximately 800 vehicles.⁴

The grant further states that one of the main purposes of the Convention Center is to attract tourists as evidenced by the promotion of the venue to tourists.⁵ The proposed grant also states that the Grantee must expend funds on “eligible advertising and promotion expenses” in order to qualify for the full quarterly grant payment.⁶ “Eligible advertising and promotion expenses” are defined as those Grantee expenses listed on Exhibit B to the Grant and the following:

[A]ll other reasonable, documented out-of-pocket costs and expenses incurred and paid by GRANTEE to third party media or similar organizations with expertise in the attraction of tourists, provided such costs and expenses must relate to promotion, advertising, marketing and attraction of tourists to the Westin Resort Convention Center venue, which marketing shall include references to Cocoa Beach and Florida’s Space Coast, as part and parcel of the promotion and advertisements of its Project.⁷

The expenses listed in Exhibit B include:

1. costs related to the website,
2. public relations,
3. marketing (development and management of marketing strategy; virtual marketing, discovery advertising campaigns, airport displays, etc.),

¹ Provision 3.2.1, Tourist Development Up To \$30 Million Grant Agreement with Dad 1300 N. Atlantic Cocoa, LP, July 15, 2022, (hereafter the TDT DAD Grant Agreement), as attached to the Brevard County Board of County Commissioners Agenda, July 19, 2022, Item I.1.

² Provision 3.2.1.1, TDT DAD Grant Agreement.

³ Provision 2.19, TDT DAD Grant Agreement.

⁴ Provision 4.1, TDT DAD Grant Agreement.

⁵ Provision 3.2.1.2, TDT DAD Grant Agreement.

⁶ Provision 2.11, TDT DAD Grant Agreement.

⁷ Provision 2.19, TDT DAD Grant Agreement.

4. advertising (social media, streaming, podcast ads, publications and trade magazines, print, billboards, and similar advertising media),
5. print collateral,
6. customer relationship management,
7. trade shows,
8. membership,
9. special events⁸

b) Factor Two: Authorization pursuant to State Statute.

The Board of County Commissioners may find that the proposed use of TDT revenue for this Grant is an authorized use under the Act at Section 125.0104, Florida Statutes. The Act authorizes counties to impose a tax on short-term rentals of living quarters or accommodations within the county, subject to the statutory parameters.⁹ The Florida Attorney General (hereafter AG) has repeatedly opined that this Act authorizes any county in Florida to levy and impose a "tourist development tax" within its borders and that the purpose of the Act is to

provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioners and tourists from within and without the state to a particular area or county of the state.¹⁰

The Act sets forth the limitations on use of TDT revenues in section 125.0104(5), Florida Statutes, which provides:

(5) Authorized Uses Of Revenue.--- (a) All tax revenues received pursuant to this section by a county imposing the tourist development tax *shall be used by that county for the following purposes only*:¹¹

Thus, TDT revenues may be expended for only those uses enumerated in the statute. The AG has specifically opined that this statute is not a broad funding source but rather "a targeted funding source to directly and primarily promote tourism."¹² As is specifically relevant to the Grant in question, section 125.0104(5)(a)3, Florida Statutes provides that TDT revenues may be used:

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

⁸ Exhibit B, TDT DAD Grant Agreement.

⁹ Section 125.0104 (3), Florida Statutes.

¹⁰ Attorney General Opinion (AGO) 2014-02, March 4, 2014; AGO 94-12, February 12, 1994.

¹¹ Section 125.0104(5), Florida Statutes; Op. Att'y Gen. Fla. 94-12 (1994).

¹² Op. Att'y Gen. Fla. 2017-06 (2017).

main purposes the attraction of tourists as evidenced by the promotion of the activity, service, venue, or event to tourists.

The AG has opined on what “activities, services, venues or events” can be incorporated within this sub-section of the Act. For example, in Attorney General Opinion (hereafter AGO) 2017-16, Walton County asked if it could use TDT revenues to fund a transit system operated by a private company pursuant to this sub-section.¹³ The AG opined that the authority which authorizes “an activity, service, venue or event” would not include the operation of a public transit system for the citizens of Walton County that would incidentally benefit tourists, but it would support funding for specific transportation services where there is a “clear and direct relationship” between the promotion of tourism and the particular service being offered.¹⁴ As to the private ownership component, the AG stated that this subsection of the statute does not restrict services eligible for funding to those “activities, services, venues or events” which are publicly provided, as long as it clearly enhances the County’s ability to attract tourists and is promoted to tourists in a manner demonstrating that tourism is one of its central purposes.¹⁵

In this case, the proposed grant provides TDT revenue to reimburse the Grantee for its costs to promote tourism at a “venue.” In keeping with the Act, in order to expend TDT revenue for the venue, the venue must have as one of its main purposes the attraction of tourists, as evidenced by the promotion of the venue to tourists. The main purpose of the grant appears to be to reimburse the Grantee for its expenses in advertising the Convention Center to tourists. That advertising also permits advertising the “remainder of the Project,” and “references to Cocoa Beach and Florida’s Space Coast.” Thus, it would appear that this venue meets the statutory requirements.

c) Whether the proposed use of the TDT revenue is an authorized use under the County’s Tourist Development Plan at section 102-119 of the Code?

The Board of County Commissioners may find the proposed grant to be an authorized use of the TDT revenue under the County’s Tourist Development Plan at section 102-119(3)a, (5)a, (6)a of the Code. These sections of the Code authorize expenditures that track the state statutory language at section 125.0104(5)(a)3, Florida Statutes, as follows:

Section 102-119(3)a of the Code, as to the TDT revenue generated pursuant to section 125.0104(3)(c), Florida Statutes (the first two pennies),¹⁶ states that

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Brevard County has authorized 5 “pennies” to be collected as TDT, under different authorities within 125.0104, Florida Statutes. The first two pennies of the tax were enacted by Ordinance 86-25, on August 21, 1986 in accordance with section 125.0104(3)(c) Florida Statutes. It became effective upon approval at a referendum on November 4, 1986. Section 125.0104(3)(c) Florida Statutes permits the funding to be used for all purposes found at section 125.0104(5), Florida Statutes.

at least 25 percent of the net revenue would be budgeted and disbursed to promote and advertise county tourism in the state, 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.

Section 102-119(5)a of the Code, as to the tax revenue generated pursuant to section 125.0104(3)(1) and section 102-117(c) of the Code (the 4th penny),¹⁷ states that

At least \$350,000.00 of the net revenue per year and up to the entire remaining amount of the net revenue, minus the planned renovations, improvements, and maintenance budgeted in the annual plan for capital maintenance and renovation, shall be budgeted and disbursed to promote and advertise tourism in the state and nationally and internationally. In addition, 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.

Section 102-119(6) of the Code, as to the tax revenue generated pursuant to section 125.0104(3)(n) and section 102-117(d) of the Code (the 5th penny),¹⁸ states that

One hundred percent of the net revenue per year would be budgeted and disbursed to promote and advertise tourism in the state and nationally and internationally; however if the 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.

These three sections show that up to the equivalent of 2.5 pennies of Brevard's TDT revenue may be used for the same purposes outlined in section 125.0104(5)(a)3, Florida Statutes.

¹⁷ Brevard County has authorized 5 "pennies" to be collected as TDT, under different authorities within 125.0104, Florida Statutes. The 4th penny of the tax was enacted by Ordinance 92-09, on June 2, 1992 in accordance with section 125.0104(3)(l) Florida Statutes. Section 125.0104(3)(l) Florida Statutes permits the funding to be used for more limited purposes, but said purposes include: "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."

¹⁸ Brevard County has authorized 5 "pennies" to be collected as TDT, under different authorities within 125.0104, Florida Statutes. The 5th penny of the tax was enacted by Ordinance 2005-21 in accordance with section 125.0104(3)(n) Florida Statutes. Section 125.0104(3)(n) Florida Statutes permits the tax only if a county has a tax already under section 125.0104(3)(l), Florida Statutes, and the funds may be used for more limited purposes, but said purposes include: "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."

d) Whether the Board of County Commissioners made the required legislative findings?

The Florida Attorney General has opined on who must determine if a particular use of the TDT revenue complies with the statutory requirements. It has stated:

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. This determination must follow appropriate legislative findings and due consideration of the specific needs and conditions of the particular locality. Any such determination must show a distinct and direct relationship between expenditure of tourist development tax revenues and the promotion of tourism.¹⁹

If the Board of County Commissioners approves funding the Grant on July 19, 2022, then the current agenda states that the Board's approval will also mean it is making the necessary legislative findings that expenditure of TDT revenue on the Grant is authorized pursuant to section 125.0104(5)(a)3., Florida Statutes and Section 102-119(3)a, (5)a, (6)a of the Code.

Analysis to Question 2:

As written, this Grant does not require an amendment to the Tourist Development Plan and the Board of County Commissioners may approve it by a majority vote. Section 125.0104(4)(d), Florida Statutes states:

After enactment of the ordinance levying and imposing the tax, the plan of tourist development may not be substantially amended except by ordinance enacted by an affirmative vote of a majority plus one additional member of the governing board.

In this case, Brevard County's tourist development plan is located at section 102-119 of the Code. As discussed in the analysis to question one above, 2.5 of the 5 pennies authorize the expenditure of TDT revenue for the following:

[P]romote and advertise county tourism in the state, 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.

As the authority already exists within the tourist development plan for this kind of expenditure, there is no requirement to amend the tourist development plan. Pursuant to section 2.10.1 of the

¹⁹ Op. Att'y Gen. Fla. 2014-02 (2014); Op. Att'y Gen. Fla. 10-26 (2010); Op. Att'y Gen. Fla. 92-16 (1992).

County Charter, the concurrence of a majority of the total number of Commissioners present is required to adopt a motion.²⁰

Conclusion: The Board may approve this grant with a majority vote upon making a legislative finding that TDT revenue is authorized for this grant pursuant to section 125.0104(5)(a)3., Florida Statutes and Section 102-119(3)a, (5)a, (6)a of the Brevard County Code of Ordinances as the project is related to tourism and primarily promotes such purpose.

²⁰ Section 2.10.1, Brevard County Charter.