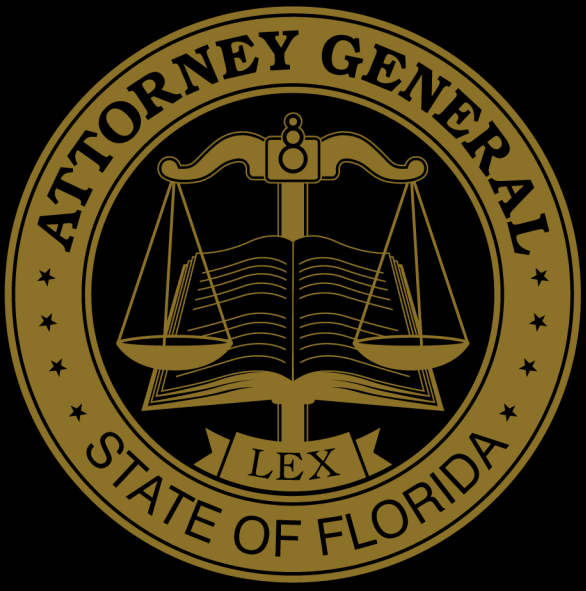
ATTORNEY GENERAL
BIENNIAL REPORT



2021-2022

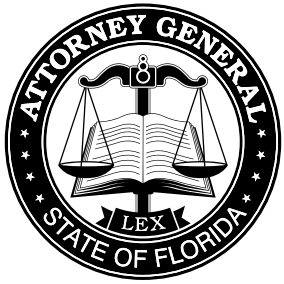
BIENNIAL REPORT

of the

ATTORNEY GENERAL
STATE OF FLORIDA

January 1, 2021 through December 31, 2022

ASHLEY MOODY
Attorney General



Tallahassee, Florida
2023

CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The 1968 Florida Constitution provides, in article IV, section 4, subsection (b), that the Attorney General shall be "the chief state legal officer."

By statute, the Attorney General is head of the Department of Legal Affairs and supervises the following functions:

Serves as legal advisor to the Governor and other executive officers of the State and state agencies;

Defends the public interest;

Represents the State in legal proceedings; and

Keeps a record of his or her official acts and opinions.

STATE OF FLORIDA
OFFICE OF ATTORNEY GENERAL
ASHLEY MOODY

April 16, 2023

The Honorable Ron DeSantis
Governor of Florida
The Capitol
Tallahassee, Florida 32399-0001

Dear Governor DeSantis:

Pursuant to my constitutional duties and the statutory requirement that this office periodically publish a report on the Attorney General official opinions, I submit herewith the biennial report of the Attorney General for the two preceding years from January 1, 2021 through December 31, 2022.

This report includes the opinions rendered, an organizational chart, and personnel list. The opinions are alphabetically indexed by subject, with a table of constitutional and statutory sections cited in the opinions.

It is an honor to serve the people of Florida with you.

Sincerely,

Ashley Moody

Ashley Moody
Attorney General

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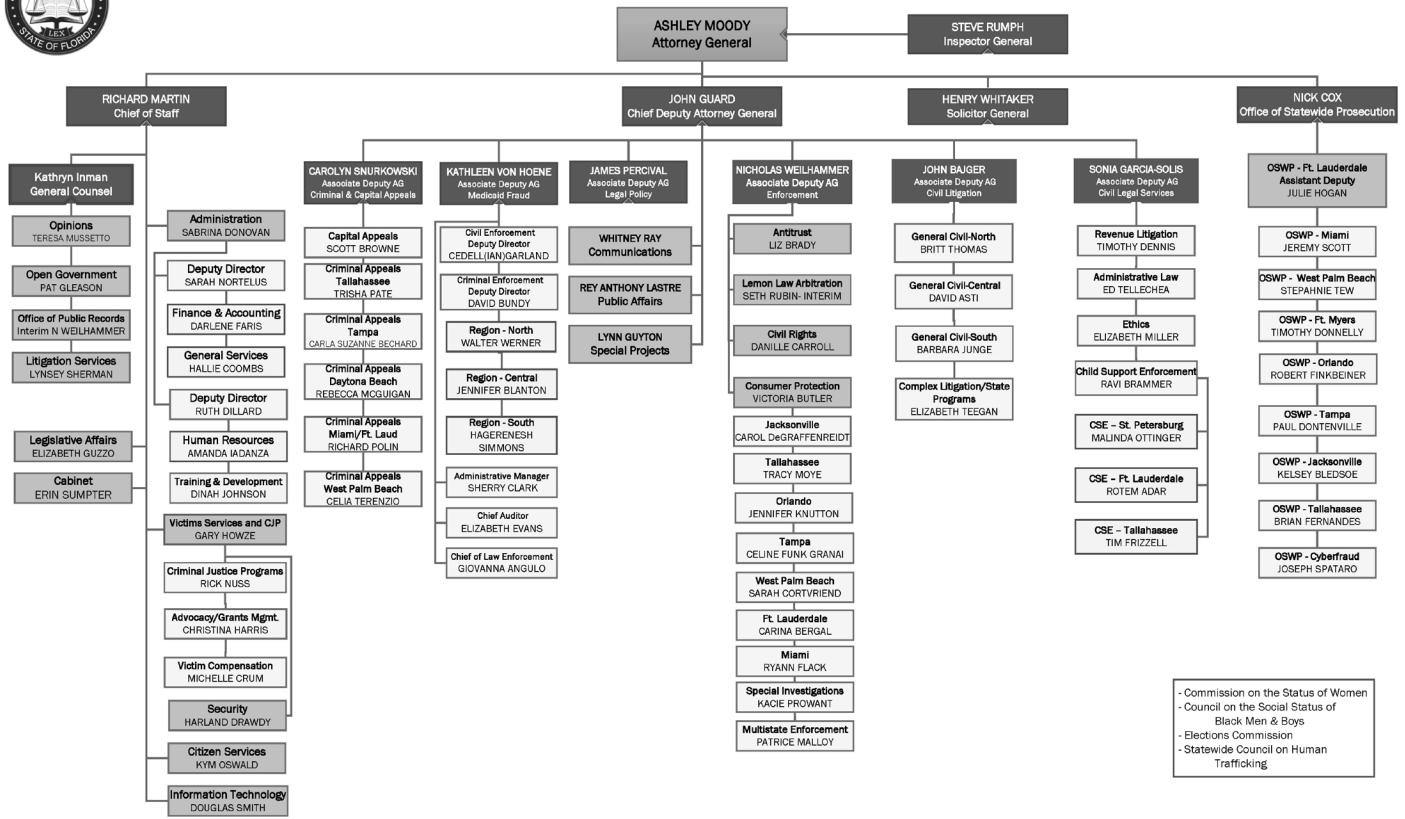

OFFICE OF THE ATTORNEY GENERAL

(as of December 31, 2022)
The Capitol, Tallahassee, Florida 32399-1050
(850) 245-0140

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DEPARTMENT OF LEGAL AFFAIRS

Statement of Policy Concerning Attorney General Opinions

I. General Nature and Purpose of Opinions

Issuing legal opinions to governmental entities has long been a function of the Office of the Attorney General. Attorney General Opinions serve to provide legal advice on questions of statutory interpretation and can provide guidance to public bodies as an alternative to costly litigation. Opinions of the Attorney General, however, while generally regarded as highly persuasive, are not binding in a court of law. Attorney General Opinions are intended to address only questions of state law, not questions of fact, mixed questions of fact and law, or questions of executive, legislative, or administrative policy.

Attorney General Opinions are not a substitute for the advice and counsel of the attorneys who represent governmental agencies and officials on a day-to-day basis. They should not be sought to arbitrate a political dispute between agencies or between factions within an agency or merely to buttress the opinions of an agency's own legal counsel. Nor should an opinion be sought to provide leverage to one side in a dispute between agencies.

Particularly difficult or momentous questions of law should be submitted to the courts for resolution by declaratory judgment. When deemed appropriate, this office will recommend this course of action. Similarly, there may be instances when securing a declaratory statement under the Administrative Procedure Act will be appropriate and will be recommended.

II. Types of Opinions Issued

There are several types of opinions issued by the Attorney General's Office. All legal opinions issued by this office, whether formal or informal, are persuasive authority and not binding.

Formal numbered opinions are signed by the Attorney General and published in the Annual Report of the Attorney General. These opinions address questions of law which are of statewide concern.

This office also issues a large body of informal opinions. Generally these opinions address questions of more limited application. Informal opinions may be signed by the Attorney General or by the drafting assistant attorney general. Those signed by the Attorney General are generally issued to public officials to whom the Attorney General is required to respond. While an official or agency may

request that an opinion be issued as a formal or informal opinion, the determination of the type of opinion issued rests with this office.

III. Persons to Whom Opinions May Be Issued

The responsibility of the Attorney General to provide legal opinions is specified in section 16.01(3), Florida Statutes, which provides:

> **Notwithstanding any other provision of law, [the Attorney General] shall, on the written requisition of the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate, and may, upon the written requisition of a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision, give an official opinion and legal advice in writing on any question of law relating to the official duties of the requesting officer.**

The statute thus requires the Attorney General to render opinions to "the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate . . . ."

The Attorney General may also issue opinions to "a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision." In addition, the Attorney General is authorized to provide legal opinions to the state attorneys and to the representatives in Congress from this state. §§ 16.08, 16.52(2), Fla. Stat. (2021).

Questions relating to the powers and duties of a public board or commission (or other collegial public body) should be requested by a majority of the members of that body. A request from a board should, therefore, clearly indicate that the opinion is being sought by a majority of its members and not merely by a dissenting member or faction.

IV. When Opinions Will Not Be Issued

Section 16.01(3), Florida Statutes, does not authorize the Attorney General to render opinions to private individuals or entities, whether their requests are submitted directly or through governmental officials. In addition, an opinion request must relate to the requesting officer's own official duties. An Attorney General Opinion will not, therefore, be issued when the requesting party is not among the officers specified in section 16.01(3), Florida Statutes, or when an officer falling within section 16.01(3), Florida Statutes, asks a question not relating to his or her own official duties.

In order not to intrude upon the constitutional prerogative of the judicial branch, opinions generally are not rendered on questions pending before the courts or on questions requiring a determination of the constitutionality of an existing statute or ordinance.

Opinions generally are not issued on questions requiring an interpretation only of local codes, ordinances, or charters rather than the provisions of state law. Instead such requests will usually be referred to the attorney for the local government in question. In addition, when an opinion request is received on a question falling within the statutory jurisdiction of some other state agency, the Attorney General may, in the exercise of his or her discretion, transfer the request to that agency or advise the requesting party to contact the other agency. For example, questions concerning the Code of Ethics for Public Officers and Employees may be referred to the Florida Commission on Ethics; questions arising under the Florida Election Code may be directed to the Division of Elections in the Department of State.

However, as quoted above, section 16.01(3), Florida Statutes, provides for the Attorney General's authority to issue opinions "[n]otwithstanding any other provision of law," thus recognizing the Attorney General's discretion to issue opinions in such instances.

Other circumstances in which the Attorney General may decline to issue an opinion include:

- **questions of a speculative nature;**
- **questions requiring factual determinations;**
- **questions which cannot be resolved due to an irreconcilable conflict in the laws (although the Attorney General may attempt to provide general assistance);**
- **questions of executive, legislative, or administrative policy;**

- **matters involving intergovernmental disputes unless all governmental agencies concerned have joined in the request;**

- **moot questions;**

- **questions involving an interpretation only of local codes, charters, ordinances, or regulations; or**

- **matters where the official or agency has already acted and seeks to justify the action.**

V. Form In Which Request Should Be Submitted

Requests for opinions must be in writing and should be addressed to:

Ashley Moody
Attorney General
Department of Legal Affairs
The Capitol PL01
Tallahassee, Florida 32399-1050

The request should clearly and concisely state the question of law to be answered. The question should be limited to the actual matter at issue. Sufficient elaboration should be provided so that it is not necessary to infer any aspect of the question or the situation on which it is based. If the question is predicated on a particular set of facts or circumstances, these should be fully set out.

This office attempts to respond to all requests for opinions within three to six months of their receipt in this office. To facilitate responses to opinion requests, this office requires that the attorneys for public entities requesting an opinion provide a memorandum of law with the request. The memorandum should include the opinion of the requesting party's own legal counsel, and a discussion of the legal issues involved, with references to relevant constitutional provisions, statutes, charter provisions, administrative rules, judicial decisions, etc.

Input from other public officials, organizations, or associations representing public officials may be requested. Interested parties may also submit a memorandum of law and other written material or statements for consideration. Any such material will be made a part of the file of the opinion request to which it relates.

VI. Miscellaneous

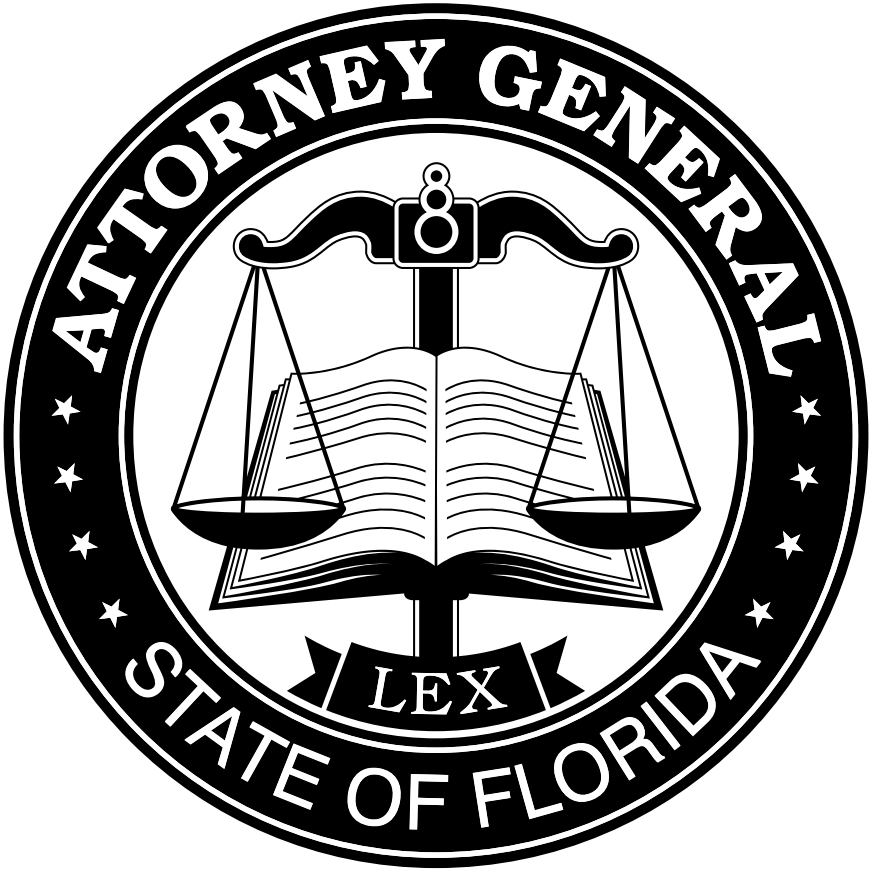
This office provides access to formal Attorney General Opinions through a searchable database on the Attorney General's website at:

MyFloridaLegal.com

Persons who do not have access to the Internet and wish to obtain a copy of a previously issued formal opinion should contact the Citizen Services Unit of the Attorney General's Office. Copies of informal opinions can be obtained from the Opinions Division of the Attorney General's Office.

For questions concerning dual office-holding, in lieu of requesting an opinion, officials may wish to use the informational pamphlet prepared by this office on dual office-holding for public officials. Copies of the pamphlet are available on the Attorney General's website and can be obtained by contacting the Opinions Division of the Attorney General's Office.

In addition, the Attorney General prepares and annually updates the Government-in-the-Sunshine Manual which explains the law under which Florida ensures public access to the meetings and records of state and local government. Copies of this manual are available on the Attorney General's website.



Ashley Moody
The Capitol
Tallahassee

BIENNIAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1, 2021 through December 31, 2022

Opinions - 2021

AGO 2021-01– September 1, 2021

ARTICLE IX, SECTION 4(b), FLORIDA CONSTITUTION – DUTY OF SCHOOL BOARD TO COMPLY WITH STATE LAW AND EMERGENCY RULES OF THE FLORIDA DEPARTMENT OF HEALTH

WHETHER ARTICLE IX, SECTION 4(b) OF THE FLORIDA CONSTITUTION AUTHORIZES A SCHOOL BOARD TO DEPART FROM STATE LAW OR EMERGENCY RULES OF THE FLORIDA DEPARTMENT OF HEALTH DEALING WITH COMMUNICABLE DISEASES, IF THE SCHOOL BOARD BELIEVES THE LAWS OR RULES ARE INVALID

To: Leonard J. Dietzen, III, Esquire, School Board Attorney, Suwannee County School District

QUESTION:

Whether Article IX, Section 4(b) of the Florida Constitution authorizes a school board to depart from (1) state law, or (2) emergency rules handed down by the Florida Department of Health dealing with communicable diseases, if that school board believes the laws or rules are invalid.

SUMMARY:

The District must comply with applicable statutes and regulations unless and until the judiciary declares them invalid.

Background

In your submittal letter, you explain that the Florida Department of Health has, by emergency rule, required that parents be able to op-out

of mask requirements in public schools, *see* R. 64DER21-12, consistent with the Parents' Bill of Rights, codified in Sections 1014.01–06, Florida Statutes, and Executive Order 21-175. You indicate that the District has made the wearing of masks by students while in school optional, but that "the Suwannee County community is not unanimous," that "there has been some dissent," and that you are "aware of multiple school boards that have implemented policies that would appear to take positions that may be contrary to these legal authorities." You therefore inquire whether the District "must follow Florida law as written," or whether it can "selectively enforce it" if the District believes the relevant legal authorities are invalid. Notably, while you say that there is pending litigation regarding the validity of the underlying legal authorities, there does not appear to be pending litigation on the question whether school districts must comply with those authorities pending such litigation.

Analysis

Article IX, Section 4(b) of the Florida Constitution authorizes local school boards to "operate, control and supervise all free public schools within the school district." Art. IX, § 4(b), Fla. Const. This authority is subject to several limits. As relevant here, it is subject to the Legislature's power to provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools." *Id.* § 1(a). Florida courts have described Florida's educational system as "a cooperative function of the state and local educational authorities" in which "[a]ll actions of district school officials [must] be consistent and in harmony with state laws." *Sch. Bd. of Collier Cnty. v. Fla. Dep't of Educ.,* 279 So. 3d 281, 285 (Fla. 1st DCA 2019) (quotations omitted).

Pursuant to its authority to legislate regarding public schools—especially school safety—the Florida Legislature has authorized the Department of Health to issue rules governing "the control of preventable communicable diseases" in schools. § 1003.22(3), Fla. Stat. Rule 64DER21-12 invokes that statute and says that schools "must allow for a parent or legal guardian," on behalf of a child, "to opt-out" of mask requirements. *See* R. 64DER21-12(1)(d).

Under Florida law, "public officials are obligated to obey the legislature's duly enacted statute until the judiciary passes on its constitutionality." *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n,* 274 So. 3d 492, 494 (Fla. 1st DCA 2019). This principle applies not only to statutes, but to "regulations" that an official has "a clear statutory duty to comply with." *Dep't of Revenue v. Markham,* 396 So. 2d 1120, 1121 (Fla. 1981); accord Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985). And while the specific result in *Markham*—that a local property appraiser lacks standing to sue the Department of Revenue to invalidate a tax regulation, 396 So. 2d at 1121—was superseded by statute, see § 195.092, Fla. Stat., the general rule in *Markham* remains

good law. *See Dep't of Transp. v. Miami-Dade Cnty. Expressway Auth.,* 316 So. 3d 388, 390–91 (Fla. 1st DCA 2021); *Santa Rosa Dunes Owners Ass'n,* 274 So. 3d at 494. Further, if a trial court declares any of these authorities invalid, the defendants would still be bound by the *Markham* rule pending appeal pursuant to the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2), unless a court vacates that stay. *See Fla. Dep't of Health v. People United for Med. Marijuana,* 250 So. 3d 825, 828 (Fla. 1st DCA 2018).

Conclusion

Based on the foregoing, it is my opinion that the District must comply with Rule 64DER21-12 and any other applicable authorities unless and until the judiciary declares them invalid.[1]

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[1] Neither this opinion, nor any of the authorities discussed herein, should be viewed as modifying a school district's responsibility under federal law to provide a free appropriate public education or otherwise accommodate a disabled student. School districts should continue to handle accommodation requests and determine disabilities in accordance with existing procedures on a case-by-case basis. It is beyond this opinion to comment on how COVID-19, with its widespread prevalence and its now endemic nature in the United States, could constitute a "disability" or lead to a "disability" under federal law. There would, however, seemingly be easy accommodations far short of requiring every student to be masked to comply with federal law.

AGO 2021-02– November 15, 2022

SECTION 125.0104(5), FLORIDA STATUTES – USE OF TOURIST DEVELOPMENT TAX REVENUE BY COUNTY RECEIVING LESS THAN $10 MILLON IN SUCH TAXES FOR DESIGN, ENGINEERING, AND PROJECT DEVELOPMENT FOR TRAILS

WHETHER SECTION 125.0104(5), FLORIDA STATUTES, AUTHORIZES A COUNTY RECEIVING LESS THAN $10 MILLION IN TOURIST DEVELOPMENT TAX REVENUE TO USE IT FOR DESIGN, ENGINEERING, AND PROJECT DEVELOPMENT STUDIES FOR TRAILS AND OTHER AUTHORIZED PROJECTS

To: Melanie Marsh, Esquire, Lake County Attorney, Lake County

QUESTION:

Whether a county that receives less than $10 million in tourist development taxes may use the tourist development tax revenue authorized under Section 125.0104(5), Florida Statutes, for design, engineering, and project development studies for trails and other authorized projects?

SUMMARY:

Because the word "construct," as used in section 125.0104(5)(b), does not subsume "design, engineering, and project development studies," and Lake County (the "County") does not receive "at least $10 million in tourist development tax revenue" in any given year—as required to use such revenue for the purposes enumerated in section 125.0104(5)(a)6—the County may not use tourist development tax revenue for design, engineering, and project development studies for trails and other authorized projects.

Background

In your letter, you describe the relevant circumstances as follows:

> Because the word "construct," as used in section 125.0104(5)(b), does not subsume "design, engineering, and project development studies," and Lake County (the "County") does not receive "at least $10 million in tourist development tax revenue" in any given year—as required to use such revenue for the purposes enumerated in section 125.0104(5)(a)6—the County may not use tourist development tax revenue for design, engineering, and project development studies for trails and other authorized projects.

> l. 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 auditorium.
>
> 2. To promote and advertise tourism in the State of Florida and nationally or internationally; or
>
> 3. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with chambers of commerce or similar associations in the county.

The 1983 statute did not use the terms "design", "engineering" [or] "project development studies" anywhere within its limited text.

In 2003, the County amended its Code to allow for the imposition of an additional two percent [tax] as authorized under Sections 125.0104(3)(d) and 125.0104(3)(l), Florida Statutes. The extra one percent tax authorized under subsection (3)(d) can be used for any purpose established under subsection (5), while the one percent tax authorized under subsection (3)(l) can only be used for the purposes enumerated in that subsection, including to promote and advertise tourism, which is the use incorporated into the County's tourist development plan.

The County desires to expand its multi-use trail system which would also connect into the West Orange Trail, the Coast-to-Coast Trail, and the Seminole County [T]rail system upon completion of the Wekiva Parkway. There can be no doubt that the expansion of the County's multi-use trail will promote tourism not only in Lake County, but on a regional basis. There is also no question that a county can use tourism taxes for a multi-use trail according to AGO 12-38. In order to expand the trail system, however, planning studies, design and engineering must be completed first before the County can acquire the necessary right-of-way and construct the actual trail infrastructure. The County would like to use the tourism taxes to pay for these professional services, but it appears the statute may not allow that expenditure absent the receipt of $10 million or more in tourism development tax revenue for the prior year. The County currently receives approximately $3 million in tourism tax revenue on an annual basis. Therefore, clarification is sought from the Attorney General as to the allowable uses of the tourist development taxes.

You have also confirmed that the County has a population of less than 950,000.

Analysis

As a threshold matter, as indicated in your letter, if the County makes the legislative determination that expansion of its multi-use trail constitutes construction, extension, enlargement, or improvement of a nature center, then expenditure of Lake County tourist development tax revenues for such undertaking would likely be permissible under section 125.0104(5)(b), Florida Statutes.[1] That subsection permits a county of less than 950,000 in population to use tourist development tax dollars "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 a not-for-profit corporation and open to the public." However, the remaining question posed is whether the term "construct," as used in section 125.0104(5)(b), includes undertaking "planning studies" and obtaining professional "design and engineering" services.

When interpreting a statute, Florida courts look "first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary."[2] As applied here, the word "construct" means "to form, make, or create by combining parts or elements."[3] But, in interpreting any statute, a single subsection cannot be read in isolation; instead, a "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts."[4]

As you pointed out in your letter, although section 125.0104(5)(b) does not specifically authorize funds to be spent for "related . . . design and engineering costs," section 125.0104(5)(a)6 does. Notably, that subsection indicates that such professional services are "related" to a county's use of funds to "acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance public facilities."[5]

While "related" means "connected by reason of an established or discoverable relation,"[6] to "include" means "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle."[7] Although professional "design and engineering"[8] services are "related" to construction activities, they are not "included" in them.[9]

Indeed, this observation is underscored by the Legislature having made separate provision for these professional services in section 125.0104(5)(a)6. If statutory authorization to expend tax revenue funds for "design and engineering costs" was already subsumed in authorizing the use of such funds to "acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance" public facilities, the Legislature would not need to address those costs separately—but it did.

In section 125.0104(5)(a)6, the Legislature authorized payment of costs to "construct, extend, enlarge, remodel, repair, [or] improve" enumerated projects separately from its authorization to pay the additional costs of

acquiring "design and engineering" services incurred in connection with those undertakings. "To interpret [these provisions] to mean the same thing would mean that the Legislature had enacted redundant, useless legislation"[10]—and it "should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation."[11]

Further, "when a statute enumerates the things upon which it operates, it is ordinarily construed as excluding from its operation all things not expressly mentioned."[12] In both section 125.0104(5)(b) and section 125.0104(5)(a)6, the Legislature has authorized expenditure of tourist development tax funds to "acquire, construct, extend, enlarge, remodel, repair, improve, [or] maintain" identified projects. But, whereas, in section 125.0104(5)(a)6, the costs of "related land acquisition, land improvement, design and engineering costs" are included as additional expenditures authorized in connection with such undertakings, in section 125.0104(5)(b), they are not.

Of importance here, in section 125.0104(5)(a)6, the Legislature has specified the conditions under which tax revenues can be expended for these additional activities, providing, in pertinent part: "Tax revenues may be used for these purposes *only if the following conditions are satisfied:* a. In the county fiscal year immediately preceding the fiscal year in which the tax revenues were initially used for such purposes, at least $10 million in tourist development tax revenue was received[.]" (Emphasis added.) Had the Legislature wanted to include these professional costs as authorized regardless of the annual amount of revenue a county has received, it could easily have done so, by eliminating the annual tax revenue threshold condition contained in section 125.0104(5)(a)6.

You concluded your letter by stating policy reasons why it would be reasonable to allow the use of tourist development tax funds for planning, design, and engineering services. Regardless of the merits of such considerations, however, this office may not interpret section 125.0104 as authorizing additional categories of expenditures where, by its plain language, the statute does not.

Conclusion

Based on the foregoing, it is my opinion that the County may not use tourist development tax revenue for design, engineering, and project development studies for trails and other authorized projects. Should you still have concerns about the application of the statute, you might wish to seek legislative clarification.

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[1] *See* Ops. Att'y Gen. Fla. 2012-38 (2012) ("Thus, it appears that the expenditure of Walton County tourist development tax revenues for the maintenance, repair, improvement and expansion of a multi-use pathway used by tourists for biking, hiking, walking and running which is part of

the recreational network of Walton County is permissible if these projects are determined by the county to satisfy the statutory requirement that they constitute an extension, remodeling or improvement of a nature center."); 94-12 (1994) ("Given these common meanings of the terms "nature" and "center" and the use of the term "nature center" along with zoological parks and fishing piers, it would appear that the Legislature contemplated that tourist development tax revenues in counties with populations of less than 600,000 persons could be used to acquire property for a project similar to a nature trail or preserve open to the public.") (footnote omitted). This office was not asked to consider—and, thus, this opinion does not address—whether the particular projects envisioned by the County would likely constitute construction, extension, enlargement, or improvement of a nature center.

[2] *Edwards v. Thomas,* 229 So. 3d 277, 283 (Fla. 2017).

[3] Webster's Third New International Dictionary 489 (1981).

[4] *Acosta v. Richter,* 671 So. 2d 149, 153-54 (Fla. 1996); *accord Jones v. ETS of New Orleans, Inc.,* 793 So. 2d 912, 914-15 (Fla. 2001).

[5] As also recognized in your letter, section 125.0104(5)(a)(6) applies only to counties receiving "at least $10 million in tourist development tax revenue" in the "county fiscal year immediately preceding the fiscal year in which the tax revenues were initially used for such purposes." Thus, Lake County cannot avail itself of this provision.

[6] Webster's Third New International Dictionary 1916 (1981).

[7] *Id.* at 1143.

[8] For a discussion regarding the interrelationship between architectural services (regulated under chapter 481, Florida Statutes) and engineering services (regulated under chapter 471, Florida Statutes), *see Trikon Sunrise Assocs., LLC v. Brice Bldg. Co.,* 41 So. 3d 315 (Fla. 4th DCA 2010).

[9] Thus, in section 489.105(3) of the definitions section of part I of chapter 489, Florida Statutes (regulating the construction industry), "contractor" is defined, in pertinent part, as "the person who is qualified for, and is only responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others *construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate,* for others or for resale to others." (Emphasis added.)

[10] Op. Att'y Gen. Fla. 2010-29 (2010).

[11] *Sharer v. Hotel Corp. of Am.,* 144 So. 2d 813 (Fla. 1962); *accord Hechtman v. Nations Title Ins. of New York,* 840 So. 2d 993, 996 (Fla. 2003) ("[S]ignificance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

[12] Op. Att'y Gen. Fla. 99-70 (1999). (reasoning that "a listing of allowed

expenditures for [local option fuel tax] revenues precludes use of such revenues for any other purpose" in concluding that such revenues could not be used to pay the operational cost for storm drainage, street lighting, and traffic signalization where the Legislature had, at that time, authorized use of such funds to pay the operational cost for bridges and public transportation, but not for storm drainage, street lighting, and traffic signalization).

Opinions - 2022

AGO 2022-01 – November 15, 2022

SECTION 509.032(7)(b), FLORIDA STATUTES – PROPOSED CITY ZONING OVERLAY DISTRICT USED TO AUTHORIZE RENTAL OF VACATION RENTALS IN SUBSET OF BASE ZONING DISTRICTS WHERE SUCH RENTALS ARE NOT CURRENTLY ALLOWED

WHETHER SECTION 509.032(7)(b), FLORIDA STATUTES, PROHIBITS ENACTMENT OF A CITY ZONING OVERLAY DISTRICT THAT WOULD AUTHORIZE RENTAL OF VACATION RENTALS IN A SUBSET OF BASE ZONING DISTRICTS WHERE SUCH RENTALS ARE NOT CURRENTLY ALLOWED BECAUSE IT WOULD HAVE THE EFFECT OF REGULATING THE FREQUENCY OF VACATION RENTALS

To: Robert Jagger, Esquire, Daytona Beach City Attorney

REPHRASED QUESTION:

Consistent with section 509.032(7)(b), Florida Statutes, which prohibits any "local law, ordinance, or regulation" that regulates the frequency of rental of vacation rentals, may the City superimpose an overlay zoning district in a designated area over only certain portions of one or more underlying base zoning districts, thereby authorizing vacation rentals not otherwise currently allowed?

As described by the City, the proposed zoning overlay ordinance would authorize a limited number, proportion, or percentage of vacation rentals to be located within a subset of properties that comprise neither "Tourist zoning districts" nor specifically designated "Redevelopment zoning districts," which are the only zoning classifications in which vacation rentals are currently allowed.[1] All other properties located within the larger set of similarly designated base zoning districts, however, would continue to be subject to existing vacation rental prohibitions.

SUMMARY:

By creating a limited geographical exception to the otherwise comprehensive base zoning district vacation rental prohibition, the proposed zoning overlay ordinance would "regulate the . . . frequency of rental" of vacation rentals in the underlying base zoning districts. Therefore, the City may not implement the proposed zoning overlay ordinance consistent with the constraints of section 509.032(7)(b), Florida Statutes.

Background

Section 509.032(7)(b), Florida Statutes, states: "A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011." Consistent with the City's request, for purposes of this opinion, I assume that housing units within the City that meet the statutory definition of vacation rentals but are not currently authorized for such use are subject to local restrictions grandfathered under section 509.032(7)(b), and you have cited an opinion from the circuit court for the Seventh Judicial Circuit[2] to support that premise.

The City identified a portion of its beachside area "commonly considered to be a core Tourism area" in which many "residential neighborhoods . . . have suffered from economic stagnation when compared to other traditionally residential areas of the City."[3] The City proposes to "encourage residential redevelopment and enhance residential property values in this area"[4] by adopting the Beachside Tourist Overlay (BTO) District via a zoning overlay ordinance.

Under the City's New Land Development Code ("LDC") as it currently exists, the "other accommodations" designation allows for vacation rentals. Currently, this designation occurs in Tourist zoning districts. Adopting the BTO District would provide for "other accommodations" uses on residential properties within the District, thereby authorizing rental of vacation rentals in the area.[5]

As further explained by the City, under the subject proposal, "[i]nstead of assigning 'other accommodations' as a permitted use for one or more zoning districts in the New LDC Use Tables[,] the City's Planning Staff proposes to amend the LDC to create a new overlay zoning district to authorize 'other accommodations' as a permitted use for any property subject to the overlay zoning designation."[6] Thus, the proposed overlay zoning district would be superimposed over portions of one or more underlying base zoning districts and "modify or supersede standards applied by the underlying base zoning district(s)"[7] by permitting vacation rentals where they would otherwise be prohibited by existing base zoning restrictions for uses outside the overlay district.

Analysis

Section 509.242(1)(c) defines a vacation rental as "any unit or group of units in a condominium or cooperative or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment but that is not a timeshare project." A "transient public lodging establishment," in turn, is defined as "any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings

which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests."[8]

Because no other qualifications or limitations are included in the statutory definition, it appears that, absent operation of a viable grandfathered local prohibition, "any unit, group of units, or house as enumerated in section 509.242(1)(c), Florida Statutes, is eligible to be used as a transient public lodging establishment and, hence, a vacation rental."[9]

Section 509.032(7)(b), Florida Statutes, prohibits local governments from enacting any law, ordinance, or regulation that regulates the "duration or *frequency of rental*" of vacation rentals.[10] This office has interpreted section 509.032(7)(b) to allow some regulation of vacation rentals as long as the regulation does not contravene the statute's terms.

In 2014, the City of Wilton Manors asked this office whether it could use zoning ordinances to regulate the location of vacation rentals. This office concluded:

> [W]hile a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7)(b), Florida Statutes.[11]

Later, in Attorney General Opinion 2016-12 (2016), this office considered that same city's proposed municipal zoning ordinance that, as relevant here, "would set distance separation requirements between vacation rentals . . . on city streets or in city neighborhoods." In essence, such an ordinance would allow any eligible unit situated within an identified base zoning designation to be used as a vacation rental *unless such unit is located next to an existing vacation rental.* The Attorney General concluded that such an ordinance would be inconsistent with section 509.032(7)(b), reasoning:

> An ordinance requiring certain distances between vacation rentals . . . could result in a prohibition against using eligible units as vacation rentals when other existing units have already satisfied the spacing . . . formulae. Although the proposed ordinance would not absolutely forbid vacation rentals in the City of Wilton Manors, a distance separation requirement . . . [has] the express purpose of prohibiting units above a certain threshold from being used as vacation rentals, which is

> contrary to section 509.032(7)(b), Florida Statutes. When there is any doubt as to whether a municipal ordinance may impair the operation of a statute, the doubt must be resolved in favor of the statute and against the ordinance.[12]

The plain and ordinary meaning of the statutory phrase to "regulate the duration or frequency of rental" would include an ordinance that permits vacation rental uses in some areas while prohibiting vacation rentals in others for properties with the same base land use classifications. When the effect of a proposed ordinance is to limit the frequency of vacation rentals in a set of properties in designated base zoning districts containing units that, but for previously grandfathered prohibitions, would be eligible for vacation rental use, the proposed local government action is not consistent with section 509.032(7)(b).

Here, the City may not, consistent with section 509.032(7)(b), impose piecemeal zoning regulations that carve out a percentage of areas having the same underlying zoning district designations for relief from its grandfathered prohibition on vacation rentals, while leaving all other such areas subject to the preexisting use restrictions. The proposed ordinance would have the practical effect of allowing any eligible unit located in areas having the same base zoning district designations to be used as a vacation rental *unless such unit is located outside the zoning overlay area.* It makes no difference whether the proposed regulatory restriction on frequency is accomplished by imposing a spacing formula in a local law of citywide application or by designating a limited geographical area of the City in which vacation rentals would be newly allowed across included base zoning district designations, while continuing to prohibit vacation rentals in all other areas having the same base zoning district designations. Although (as with the proposed Wilton Manors ordinance) the proposed City zoning ordinance would allow a greater percentage of residential units within the City to be used as vacation rentals, it would do so in a disparate and limited manner, using differentiating criteria that the applicable statutory provisions do not authorize.

Conclusion

Accordingly, unless and until judicially or legislatively determined otherwise, it is my opinion that, because the proposed ordinance would have the effect of regulating the "frequency" of vacation rentals by exempting only a percentage of otherwise eligible housing units in the base zoning district designation categories from the preexisting, overarching prohibition against vacation rentals currently imposed by grandfathered base zoning district provisions, the City's proposed zoning overlay ordinance would exceed the regulatory authority granted in section 509.032(7)(b).

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[1] Letter from Robert Jagger to Ashley Moody dated April 7, 2022, at 2 (on file with the Office of the Florida Attorney General).

[2] *Mary L. Synk v. City of Daytona Beach,* No. 2017-31231-CICI (Fla. 7th Cir. Ct. May 14, 2019), *aff'd,* 300 So. 3d 657 (Fla. 5th DCA 2020) (table).

[3] Letter from Robert Jagger to Teresa L. Mussetto dated May 19, 2022, at 3-4 (on file with the Office of the Florida Attorney General).

[4] *Id.* at 4.

[5] *Id.* at 3-4.

[6] *Id.* at 3.

[7] *See generally* City of Daytona Beach, Fla., Code of Ordinances § 4.9.A.

[8] § 509.013(4)(a)(1), Fla. Stat. (2022).

[9] Op. Att'y Gen. Fla. 2016-12 (2016).

[10] *See* Webster's Third New International Dictionary of the English Language Unabridged 909 (1993) (defining "frequency" as the "number of individuals falling within a single class when objects are classified according to variations in a set of one or more specified attributes"); *see generally Seagrave v. State,* 802 So. 2d 281, 286 (Fla. 2001) ("When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.").

[11] Op. Att'y Gen. Fla. 2014-09 (2014).

[12] Op. Att'y Gen. Fla. 2016-12 (2016), citing *Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So. 2d 494, 504 (Fla. 1999) (quoting *Rinzler v. Carson,* 262 So. 2d 661, 668 (Fla. 1972) (additional citations omitted)).

INDEX AND CITATOR

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Subject *Opinion No.*

CITATOR

CITATOR TO FLORIDA CONSTITUTION, FLORIDA STATUTES, AND LAWS OF FLORIDA CONSTRUED IN OPINIONS RENDERED FROM JANUARY 1, 2021 THROUGH DECEMBER 31, 2022

CITATOR TO FLORIDA STATUTES

CHAPTER, FLORIDA STATUTES

STATE CONSTITUTION