CITY COUNCIL WORKSHOP/SPECIAL CALL MEETING
TUESDAY, JUNE 23, 2020 9:30 A.M.
CITY HALL, COUNCIL CHAMBERS, VERO BEACH, FLORIDA

A G E N D A

1. CALL TO ORDER

A) Roll Call
B) Pledge of Allegiance to the Flag

2. ITEMS FOR DISCUSSION:

A. Complete the Study for the Stormwater Utility

B. Panhandling Ordinance

C. Tourist Tax

D. Body Cams

3. PUBLIC HEARING

1) An Ordinance of the City of Vero Beach, Florida, amending Chapter 38, Article 1 (Signs) of the Land Development Regulations to Revise or Add Sign Definitions, Revise the List of Prohibited Signs, Revise the List of Signs exempt from the Sign Regulations, Revise the list of Signs not requiring permits, Revise the General Sign Regulations, add standards for Specific Sign Types, Revise Sign Requirements for Residential and Non-Residential Zoning Districts, Revise Temporary Sign Standards, and Requirements for Removal of Abandoned Signs, Revise Standards for non-conforming Signs, add a Substitution Clause, and Revise Application Review Process; Providing for Codification; Providing for Conflict and Severability; and Providing for an Effective Date. – Requested by the Planning and Development Director

4. ADJOURNMENT

This is a public meeting. If a person decides to appeal a decision made by the Council with respect to any reviewable matter considered at such meeting, he or she will need a record of the proceedings, and for such purpose, he or she is responsible for ensuring that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. Anyone who needs a special accommodation for this meeting may contact the City's Americans with Disabilities Act (ADA) Coordinator at 978-4920 at least 48 hours in advance of the meeting.

OFFICE OF THE CITY ATTORNEY

MEMORANDUM

To: Mayor Young, Vice-Mayor Moss, Councilmember Brackett, Councilmember Graves and Councilmember Neville

From: John S. Turner, City Attorney

Subject: Panhandling Discussion at Workshop

Date: June 9, 2020

ISSUE:

The First Amendment is the main issue to consider in regulating panhandling on public property. To have any chance of upholding the regulation, it must be framed as a safety measure designed to protect the people from harassment, and prevent interaction between vehicular traffic and pedestrians soliciting money in or near the roadway. City of Vero Beach is particularly concerned about the effects of panhandling on public safety, tourism, and small business.

BACKGROUND:

City of Vero Beach's Ord. Section 62-84(b) currently prohibits any person from "begging on any right-of-way" other than on public sidewalks and on certain sized, center medians. There are also prohibitions in City of Vero Beach Ord. Section 74-173(a)-(d) on impeding traffic. The request to review current uses by pedestrians of City of Vero Beach's rights-of-way relates to the public sidewalks and entering into the traveled portions of the roadway.

CURRENT LAW:

Since the landmark Supreme Court case of *Reed v. Town of Gilbert* (2015), the vast majority of courts presented with the question have struck down panhandling ordinances. Every challenge to a panhandling ordinance in Federal Court- a total of approximately 25- has been successful. In *Reed*, the Court explained that laws that discriminate against speech on their fact or in their purpose are considered content-based and are subject to strict scrutiny. This decision has made an impact on panhandling litigation, as lower courts have invalidated numerous panhandling laws as impermissible content-based restrictions on speech.

If the ordinance is determined to be a "content-based" restriction on speech, and therefore, presumptively unconstitutional under *Reed*, the courts use the most stringent standard-strict scrutiny to review such restrictions. For such a content-based ordinance

to survive strict scrutiny analysis, it must serve both a compelling state interest and be narrowly tailored.

A recent court decision in Florida noted several Federal Court holdings rejecting claims that such ordinances should be upheld based on the needs to protect tourism, expand City's economic base, and protect the City's economy. These reasons are not sufficient to survive strict scrutiny. *Toombs v. State of Florida*, 11th Circuit Court, Miami-Dade County (15-220 AC, July 2017).

Another case that has prompted many cities to address their panhandling ordinances is *Homeless Helping Homeless v. City of Tampa*, United States District Court for the Middle District of Florida, 15-CV-1219 (August 5, 2016). This case struck down a Tampa ordinance that banned solicitation of "donations or payment. "There was a strong presence of local business owners and educators that demanded a strict panhandling exclusion zone in Ybor City and downtown. The Tampa City Council discussed enacting an ordinance to create zones "particularly in tourist areas," in which a person "could be free from all types of [oral] unsought solicitation." The council passed an ordinance that banned the solicitation of "donations or payment" with an exception permitting "solicitation that only involves holding a sign." The ordinance applied to any act that impeded the passage of motor vehicles or persons attempting to enter or exit motor vehicles.

The court noted that soliciting donations or payment is a form of speech protected by the First Amendment and that the ordinance regulates soliciting money in areas that contain traditional public forums such as a public street, a public sidewalk, or even a public park. Such locations receive special protection under the First Amendment.

In addition to traditional public forum, if the regulation impedes speech it must satisfy "strict scrutiny," which means that the ordinance is constitutional only if the regulation employs the least restrictive means of advancing a compelling governmental interest. A content-based regulation of speech is "presumptively unconstitutional." In contrast, a regulation imposing only a reasonable and content-neutral restriction on the time, place, and manner of speech must withstand only "intermediate scrutiny," which permits a regulation both narrowly tailored to serve a significant governmental interest and "leaving open ample alternative channels for communication of the information."

There is some encouraging news from a case out of the 10th Circuit Court of Appeals in Denver from 2019 on the use of medians by pedestrians. Although not controlling precedence in our Federal Circuit (which is the 11th Circuit), the holding would carry some weight in Florida. *Evans v. Sandy City* upheld the constitutionality of an ordinance regulating pedestrian use of medians that were less than 36 inches, and was based on the personal observations and anecdotal public safety testimony of a police captain and city prosecutor. An ordinance prohibiting individuals from sitting or standing in medians located within streets or highways where the posted speed limit is 40 mph or greater was held constitutional in *McCraw v. City of Oklahoma City*.

CONCLUSION:

In light of the holdings in *Reed* and *City of Tampa* (as well as other court decisions), if Council desires to proceed with discussions on amending and/or re-writing the panhandling ordinance in order to comply with these requirements, I recommend you solicit testimony from City of Vero Beach Police Department, sanitation workers, business owners, and even medical providers, in order to set forth the legislative purposes in the preamble to successfully defend any challenges.

Cc: Monte K. Falls, P.E., City Manager
Tammy K. Bursick, City Clerk

OFFICE OF THE CITY ATTORNEY

MEMORANDUM

To: Mayor Young, Vice-Mayor Moss, Councilmember Brackett, Councilmember Graves and Councilmember Neville

From: John S. Turner, City Attorney

Subject: Discussion of Tourist Development Tax on City Council Workshop June 23, 2020

Date: June 9, 2020

1. BACKGROUND

Tourist Development Tax is authorized under section 125.0104, Fla. Stat. Currently, Indian River County collects 4 cents on every dollar spent on rentals from hotels, condos, and other types of short term rentals (six months or less). The Tourist Development Tax funds are applied as follows:

- One and one-half cents on beach re-nourishment/beach projects.
- One cent for former Dodgertown facility and to retire bonds on the project.
- One and one-half cents for promotion/advertise for tourism in the county.

Authorized uses of Tourist Development Tax funds permitted under section 125.01047(5)(a)1-5, Fla. Stat. are to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more:

1. Publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, or auditoriums within the boundaries of the county or sub-county special taxing district in which the tax is levied;

2. Auditoriums that are publicly owned but are operated by organizations that are exempt from federal taxation pursuant to 26 U.S.C. s. 501(c)(3) and open to the public, within the boundaries of the county or sub-county special taxing district in which the tax is levied; or

3. Aquariums or museums that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public, within the boundaries of the county or sub-county special taxing district in which the tax is levied;

4. To promote zoological parks that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public;

5. 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;

6. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county, which may include any indirect administrative costs for services performed by the county on behalf of the promotion agency;

7. To finance beach park facilities, or beach, channel, estuary, or lagoon improvement, maintenance, re-nourishment, 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.

Tourist Development Tax procedures under the statute require the tourist development tax be levied and imposed pursuant to an ordinance containing the county tourist development plan enacted by the governing board of the county. Prior to enactment of the ordinance levying and imposing the tax, the county tourist development council shall prepare and submit to the county commission for its approval a plan for tourist development. The plan shall set forth the anticipated net tourist development tax revenue to be derived by the county for the 24 months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use as the same are authorized under subsection above. The plan shall include the approximate cost or expense allocation for each specific project or special use.

The county commission appoints the advisory council known as the "(name of county) Tourist Development Council." This council is established by ordinance and composed of nine members.

The council shall continuously review expenditures of revenues from the tourist development trust fund and shall receive, at least quarterly, expenditure reports from the county commission or its designee. Expenditures, which the council believes to be unauthorized, shall be reported to the county governing board and the Department of Revenue. The board of county commissioners and the state department of revenue shall review the findings of the council and take appropriate administrative or judicial action to ensure compliance with the statute.

Indian River County imposed the tourist development tax, established the tourist development council, and authorized use of tax revenue by Ordinance 87-11. It also established two taxing districts: District One encompasses the City of Vero Beach, and District Two the remainder of Indian River County.

2. Compliance with State Law.

City Council has inquired as to possible conflicts between the statutes and county ordinances and which entity should control tourist development tax funds that come from District One, and of the use of tourist development tax funds for more beach improvements, including lifeguard salaries and towers. It also has concerns with the contract with the Chamber of Commerce and the amount and use of tourist development tax funds collected from District Two.

State law prevails over inconsistent (or preempted) County Ordinances regarding collection and expenditure of tourist development tax funds.

As noted above, the statute requires the County to adopt an expenditure plan for the first two years of collection of funds. This was part of the referendum approving the tourist development tax as contained in Ordinance 87-11. The expenditures approved in the referendum for years 1987-1989 for District One (City of Vero Beach) are much different in comparison to what is presently spent. Once the plan has been adopted, it cannot be "substantially" amended except by ordinance approved by super majority of county commission. The City Attorney is investigating whether this amendment to the plan was properly adopted. If it was not, expenditures to date may have been improper and subject to a recovery action. If the amendment was properly adopted, expenditures must still meet the test that they be spent on tourist related and based matters, not on administration expenses.

In 2003, the tourist development council adopted a formal rating process that was a two-part process: (1) 70% of tourist development tax was divided between the Indian River Chamber of Commerce and the Sebastian Chamber; (2) All other requests for funding will be submitted for review and funded according to a grading system, which will determine which entities receive funding. As reflected in the minutes of the tourist development council on 10/29/02, the rules of how the requests were to be graded were not approved by the BCC, which may be a violation of state law. The tourist development council's job under the statute includes making recommendations to the BCC for the effective operation of the special projects or for uses of the tourist development tax revenue and perform such other duties as may be prescribed by county ordinance or resolution.

The BCC has the authority to amend the plan by a super majority of its members in order to expend tourist development funds for a use which is authorized under Section 125.0104 without requiring a referendum, but which may be opposed or not recommended by the tourist development council. AGO 92-34

3. Beach Park Facilities.

The provision "finance beach park facilities" amended and replaced "finance beach improvements" by the legislature in 1996. Under the prior wording, the AGO issued opinion 90-55 stating that the statute prohibited use of tourist development tax funds for lifeguards or additional law enforcement as "beach improvements." Under the amended wording, AGO has opinioned that tourist development tax funds may be used for a boat

ramp and elevated platform on a river (AGO 2015-14) and used to acquire land and adjacent rights-of-way to provide public parking to serve beach access areas (AGO 2012-38) but not to fund law enforcement at a nature center (AGO 2016-18).

There are no other AGO's or court decisions on authority to make expenditure of tourist development tax funds for lifeguard stands, towers, or lifeguard salaries. Several counties have approved funding using tourist development tax funds for lifeguards as tourist-related public safety purposes (Okaloosa County) and comprehensive lifeguard programs (Bay County), and lifeguard stands (Santa Rosa County).

It is arguable that lifeguard towers/stands and even their salaries are "beach park facilities" since this would advance and promote tourism. The following summarizes how such a funding request could and should proceed:

"Thus, the construction of publicly owned facilities financed by the proceeds from a tourist development tax must be primarily related to the advancement and promotion of tourism. The determination of whether a particular facility or project is tourist related and primarily promotes such a purpose is a factual determination that must be made by the governing body of the county. This factual determination must be based on appropriate legislative findings and due consideration of the peculiar and prevailing local conditions and needs." AGO 2012-38

Lifeguard stands/towers should be regarded and defined as beach park facilities. Lifeguard salaries could also be requested as promoting tourist safety and for the public use of beach facilities.

Cc: Monte K. Falls, P.E., City Manager
Tammy K. Bursick, City Clerk