Legal Update

BELL & ROPER, P.A.

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PUBLIC RECORDS- CONTRACTS

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The Attorney General recently issued an opinion interpreting the term "Contractor" as used in Section 119.0701, Florida Statutes. See, Fla. AGO 2014 -06, 2014 WL 2906024 (Fla.A.G. June 18, 2014). That statute, which was enacted during the 2013 Legislative session, mandates that public entities include a provision in all of their contracts with private…

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EEOC ISSUES TOUGHER ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued new Enforcement Guidance regarding pregnancy discrimination. This is the first comprehensive update to the EEOC's Pregnancy Discrimination Guidance in 30 years. The Guidance discusses employer practices that the EEOC considers permissible and impermissible based on its interpretation of the Pregnancy Discrimination Act of 1978 ("PDA"), Title VII of the Civil Rights Act of 1964 ("Title VI"I), and Title I of the Americans with Disabilities Act ("ADA"). It reiterates well-established law on pregnancy discrimination, but also arguably expands the reach of the

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contractors, requiring said entities to comply with Florida's Public Records Law. The question presented was whether the language, "… and is acting on behalf of the public agency …", contained in section 119.0701(1)(a), Florida Statutes, causes the nature of the services provided being to be the determining factor as to the applicability of Chapter 119.0701 Florida Statutes, to a contractor; or instead whether a contract for services with a public agency, regardless of the nature of the services, automatically resulted in that private contractor being subject to the requirements of the Public Records Law.

The Attorney General opined that since the term "Contractors" is defined in the statute as those "enter[ing] into a contract for services with a public agency and … acting on behalf of the public agency …."] the statutory requirements for contractual provisions relating to Florida's Public Records Law apply only to those "contractor[s]" coming within the scope of the statute, that is, those who not only enter into a contract for services with a public agency, but are also "acting on behalf of the public agency" in providing those services. In reaching that determination, the Attorney General relied, in part, upon language from the opinion in Parsons & Whittemore, Inc. v. Metropolitan Dade County, 429 So. 2d 343 (Fla. 3d DCA 1983), where the court noted, in pertinent part, "We are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation acts 'on behalf of' the agency." The Attorney General summarized her ultimate conclusion as follows:

> "In sum, it is my opinion that the requirements of section 119.0701, Florida Statutes, apply to "contractor[s]" who contract with public agencies and are acting on behalf of the public agency in providing those services. Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is "acting on behalf of" an agency and thus, would be subject to the requirements of the statute".

By: Michael J. Roper, Esquire

current law by requiring accommodation of pregnancy under the PDA and ADA (as amended by the ADA Amendments Act of 2008 ("ADAAA")) and by stating that employers should treat pregnant employees in the same manner as similarly situated employees injured on the job.

The EEOC also clarified several policies, including one that spells out when businesses may have to provide pregnant workers light duty and another that bans employers from forcing a pregnant worker to take leave even in cases when she's able to continue on the job. The policy further clarifies that lactation is a pregnancy-related medical condition and therefore, has all the protections of the law, including requirements for schedule flexibility and a private place to express milk. On the subject of caregivers, while leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions, the EEOC stated that employers who allow parental leave must provide it to men and women equally. "If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth, it cannot lawfully refuse to provide an equivalent amount of leave to new fathers for the same purpose," the EEOC said in a Q&A on its rules.

The PDA prohibits discrimination based on pregnancy, childbirth, or related medical conditions. The ADA prohibits employment discrimination on the basis of disability and requires that an employer provide reasonable accommodation for an employee or applicant with a disability. Pregnancy itself is not a disability under the ADA, but pregnant employees and applicants are not excluded from its protections. The EEOC's Guidance explains that changes to the definition of "disability" in the ADAAA made it easier for workers with pregnancy-related impairments to demonstrate the need for reasonable accommodation under the ADA. Prior to the ADAAA, courts typically held that medical conditions related to pregnancy were not impairments within the meaning of the ADA. But a broader range of temporary impairments associated with pregnancy may qualify as disabilities under the ADAAA – at least where employees can show that pregnancy-related conditions substantially limit their ability to perform one or more major life activities.

The EEOC provided examples of the types of reasonable accommodation that can

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be provided for pregnancy-related disabilities such as: "allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool, altering how job functions are performed; or providing a temporary assignment to a light duty position." The Guidance also discusses pregnancy issues that implicate Title VII. Along with prohibiting discrimination against pregnant employees, the EEOC interprets Title VII as prohibiting discrimination on the basis of an employee's past pregnancy, stated intent to become pregnant, infertility treatment, or use of contraception. The EEOC adds that pregnant women must be treated in the same manner as those who are not pregnant and given the same access to benefits (*e.g.*, light duty or leave).

The EEOC's Guidance suggests that employers evaluate restrictive leave policies (*e.g.*, a probationary period during which leave cannot be taken) to determine whether they disproportionately impact pregnant workers and, if so, whether they are necessary for business operations. The Guidance suggests that employers ensure that any such policies note that employees may qualify for leave as a reasonable accommodation. Additionally, the EEOC encourages employers to review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations. If feasible, the Guidance suggests that employers should temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions.

The EEOC suggests that employers develop, disseminate, and enforce strong policies addressing the types of conduct that would constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions. Further employers are encouraged to ensure that those policies provide multiple avenues for raising concerns. Employers should also develop specific, job-related qualification standards for each position that reflect the position's duties and minimize the potential for gender stereotyping and discrimination on the basis of pregnancy, childbirth, or related medical conditions.

The New Enforcement Guidance can be reviewed at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

By: Cindy Townsend, Esquire

2014 Legislative Session Highlights

One of the major components of the 2014 Legislative Session, affecting local governments, was the tax package. Although the tax cuts for 2014 will have an impact on local governments, it could have been much worse. City and County lobbyists worked hard to reduce the impacts of the multiple proposals contained within the overall tax cut package. The following reflects the estimated statewide impact to local governments:

Tax Cut	1 Year Applicability	Ongoing Applicability
Holiday		
Back to School	($7,3000,000)	
Hurricane Preparedness	($820,000)	
Energy Efficient Appliances	($300,000)	
Exemption		
Car Seats		($500,000)
Youth Bicycle Helmets		(unknown)
Cement Mixers	($400,000)	
Therapeutic Pet Foods		($600,000)
College Meal Plans		($2,600,000)
Miscellaneous		
Private Label Credit Card Purchases Deemed Worthless		($1,600,000)
Community Contribution Credit	($1,630,000)	
Prepaid Calling		($11,200,000)
Total Fiscal Impacts	**($13,150,000)**	**($16,500,000)**

Also of interest from the 2014 session are those issues affecting local government entities that failed to maintain enough momentum to pass.

- None of the damaging growth management and environmental bills passed.
- All but one of the bills amending the public records law failed.
- The proposed red light camera legislation repealing the use of cameras in intersections failed.
- The revised Juvenile Justice cost sharing formula between counties and the state did not pass.
- The changes in the way school districts enter into contracts with charter schools and share facilities with charter schools failed.
- Creation of a certification process for sober homes and recovery residences stalled in Senate Appropriations.

By: Sherry Hopkins, Esquire

FIRM SUCCESS

The Fifth District Court of Appeals recently ruled in favor of the City of Flagler Beach in a case litigated by Bell & Roper attorneys Michael Roper and Dale Scott. Ocean Palm Golf Club Partnership v. City of Flagler Beach, 139 So.3d 463 (Fla. 5th DCA, May 30, 2014). In the case, the owners of two properties, which total 37 acres, and which was previously operated for years as a golf course, requested that the City permit a change in the long-standing "recreation" designation of the property to allow for the development of a large residential subdivision. After years of litigation, and several prior lawsuits, the case was tried in late 2012, with the plaintiffs seeking some $13.1 million in damages. After hearing the evidence, the trial court found the City's actions in denying the request did not amount to an unconstitutional "taking." In this respect, the court found that, even under the existing recreation land use designation (and high-density residential, as to the smaller, 3-acre parcel embedded within the larger parcel) the land owners were not without the ability to make economically beneficial use of the property. The plaintiffs appealed to the Fifth District Court of Appeal. Ultimately, the owner of the smaller parcel dismissed its appeal. Ocean Palm, who owned the larger, 34-acre portion, argued the lower court wrongfully considered whether it had an economically beneficial use of the property by considering the two parcels together. Essentially, Ocean Palm argued that since it could not operate a golf course on the 34-acre parcel in an economically beneficial manner, the City was obligated to change the land use designation to permit a residential development, or pay significant compensation for an unlawful "taking." The Fifth District Court of Appeal disagreed. The Fifth District found the two parcels were properly considered as one due to the history of the parcels acting together as to development efforts. Also, the Fifth District confirmed a point of law which has long been understood by litigators (at least, those representing governmental entities), but which no prior case had clearly stated: "In effect, Ocean Palm Golf's position is that if a landowner buys a piece of property and the economy later takes a downturn, resulting in the frustration of the landowner's expectations, then the government must act as a guarantor for the landowner's investment after it becomes unprofitable due to, not the zoning regulations, but outside market forces. This is not the purpose of eminent domain law." Id. at 473.

Ocean Palm is presently seeking an appeal before the Florida Supreme Court, and it is unknown whether the Supreme Court accept the appeal. We believe it is unlikely the Supreme Court will accept this case, as there is no clear conflict between the Fifth District's opinion, in any prior precedent of the Supreme Court, or any other District Court of Appeal. That said, we congratulate the City of Flagler Beach in prevailing in this matter, and look forward to representing the City before the Supreme Court should this appeal proceed further.

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Christian Anderson at canderson@bellroperlaw.com