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Beach Management Pilot Proposed by DEP

In March, the Florida Department of Environmental Protection (DEP) unveiled a proposal to take a regional approach to beach management through a pilot project in Palm Beach County. If the initiative is determined to be feasible, DEP would issue a permit for a “beach management agreement” encompassing the 15.8 miles of shoreline between Palm Beach and South Palm Beach inlets. Stakeholders falling within that stretch of beach, including local project sponsors and residents as well as environmental groups who have challenged permits in the past, would work collaboratively on the front end of the permitting process, with the goal of identifying issues early and reducing uncertainty in the environmental review process. Additionally, under the proposal, DEP could authorize maintenance renourishment for projects within the beach management agreement through notices to proceed, rather than requiring an applicant to reapply for a permit to complete work on a previously permitted site.

DEP has not taken this type of regional approach to beach management before; however, it is comparable to the Ecosystem Management Agreement for Bay and Walton counties, established by DEP in 2004 to offer applicants predictability in the environmental resource permitting process and ensure that regional concerns are taken into account. The beach management pilot would also require federal cooperation, through the U.S. Army Corps of Engineers.

The first stakeholder meeting will take place on May 16. While as of now, the proposal is only in conceptual form and will not affect Broward County’s beach projects in the foreseeable future, the County will be closely monitoring the proposed pilot project as more details unfold.

Federal Agencies Raising Concerns about HB 503

Since passing the Legislature with almost unanimous support during the 2012 Session, two federal agencies have raised concerns about the potential impacts of HB 503, the comprehensive streamlined environmental permitting bill sponsored by Rep. Patronis. The Governor has a May 5 deadline to either approve or veto the legislation.

The Federal Emergency Management Agency (FEMA) contends that certain sections addressing permit sequencing and conditioning may be inconsistent with federal regulations and impede the ability of state and local governments to comply with federal law. HB 503 provides that local governments may not require, as a condition of processing or issuing a development permit, that a permit applicant first obtain another

permit or approval from any other state or federal agency. FEMA administers the National Flood Insurance Program (NFIP), through which the agency provides access to affordable flood insurance in communities that adopt local floodplain management regulations meeting or exceeding the minimum federal regulations; currently, more than two million NFIP flood insurance policies are in effect in Florida. One aspect of the NFIP program requires participating communities to review all proposed development projects impacting floodplains to ensure that all necessary permits are in place prior to commencement of construction; specifically, the local permit must either be conditioned on the receipt of other required permits, or the local government can opt to not grant the permit until the applicant actually receives the other necessary permits. Under HB 503, however, local governments could be required by state law to issue floodplain development permits without these conditions, putting them in violation of the NFIP's requirements and potentially subjecting them to suspension from the program, causing policy holders to lose their flood insurance.

After the problem was identified by FEMA, the Florida Division of Emergency Management (FDEM) issued to all NFIP participating communities a recommendation that permits for development in floodplains include a condition that all requisite state and federal permits must be obtained before construction can begin. FDEM has also indicated its intention to resolve the problem legislatively in the 2013 Session, provided that the bill is approved by the Governor. As of now, it appears that these actions have appeased FEMA, as long as FDEM can effectively ensure that NFIP communities continue to comply with federal regulations.

Additionally, the U.S. Fish and Wildlife Service (FWS) this week raised concerns about the section of HB 503 specifying that the DEP may issue a permit before an applicant receives any requisite incidental take authorization under the federal Endangered Species Act (ESA). Although the specific section further stipulates that where applicable, DEP-issued permits include a condition that project activities not commence until an incidental take authorization is actually received, FWS believes the legislation could nevertheless reduce coordination and potentially expose local governments to federal liability under the ESA. In the event that Governor Scott approves HB 503, legislation addressing these conflicts may be forthcoming in the 2013 Session.

Juvenile Justice Update

On Monday, an administrative law judge heard arguments from Okaloosa and Nassau counties and the Department of Juvenile Justice (DJJ) on who is responsible for detention costs for juveniles who are arrested and waiting for judges to rule on their cases.

The counties called into question the policy established in §985.686, F.S., which mandates that counties financially contribute towards the costs of providing detention care for juveniles. Each county is required to pay the DJJ the cost of detention care provided to a juvenile during the period prior to final court disposition (i.e., pre-adjudicatory detention care).

Central to this dispute is the interpretation of language in the statute dictating that counties are responsible for costs "prior to final court disposition." Counties are challenging the DJJ rule that interprets the law as meaning that disposition occurs when a judge commits a juvenile to a state facility. Okaloosa and Nassau contend that disposition and commitment are not always the same and can occur at different times. For example, a juvenile can be sentenced to probation but still kept in detention. The DJJ

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believes its interpretation to be consistent with state law.

Counties also argued that the DJJ system unfairly requires them to pay more for juvenile detention than the actual cost of detention services. The DJJ budget relies on estimates of detention costs and that budget must be met each year. Florida counties contend that this created a situation where costs are designed to meet a budget requirement as opposed to reflecting the actual costs of juvenile detention. The DJJ maintains that the amount to be paid is fairly calculated based on the prior use of secure detention for juveniles that are residents of the county.

Other counties who have initiated cases against the DJJ include Bay, Hernando, Lee, Miami-Dade, Pinellas and Seminole.

Online Travel Companies Ruling

On April 19, a Leon County circuit court judge ruled that the state law relating to county tourist development taxes is too vague to support the counties' position that online travel companies (OTCs) must remit taxes on the full hotel room prices charged to customers, rather than the lower price paid by OTCs when purchasing excess rooms from the hotel companies. The OTCs maintain that the law requires them only to remit taxes on the actual product or service being purchased, in this case the hotel room, and that the markup price charged to customers reflects services, which are not taxable under state law. Moreover, OTCs contend that they are simply intermediaries, and not actual providers of the hotel product or service.

The seventeen Florida counties and four county tax collectors involved in the lawsuit, who allege that the online travel companies have been improperly withholding millions in tax revenue from the counties, are planning to appeal to the Second District Court of Appeal. Broward County's lawsuit against several OTCs is currently pending before a different Leon County circuit judge. It is unknown at this time what, if any, effect the ruling will have on the county's case.

Medicaid Billing Lawsuit Filed

On April 26, the Florida Association of Counties, joined by 47 individual counties, filed suit against the Florida Department of Revenue (DOR) and Agency for Health Care Administration (AHCA) challenging implementation of HB 5301. Specifically, the complaint alleges that Section 12 of HB 5301 is unconstitutional and therefore unenforceable under Article VII, Section 18 of the Florida Constitution, which requires a super-majority vote for laws that impose unfunded mandates on local governments. Additionally, the suit challenges the provision directing AHCA to collect on disputed bills that are more than four years old and therefore barred by the statute of limitations. Although HB 5301 contains no severability clause, the lawsuit only challenges the particular section containing the provisions related to Medicaid billing and withholding of county revenue sharing to satisfy charges. The Broward County Board of County Commissioners voted to join the lawsuit on April 17.

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