



## MEMORANDUM

To: City Council, Marco Island, Florida

From: Alan L. Gabriel, City Attorney

Copy to: Michael A. McNees, City Manager

Re: City Attorney Matter Review for  
March 15, 2021 Council Meeting

Date: March 8, 2021

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During the period commencing from February 8, 2021 through March 5, 2021 matters:

### General City Business

- Miscellaneous Public Records Requests
- COVID Vaccinations
- Vacation Rentals
- Boards and Committee Sunshine Law and Ethics Workshop

### For Council Agenda Approval

- Reso. Approving Island Country Club Site Development Plan
- Reso. Approving Marco Island Academy Site Devel. Plan Amend.
- Reso. Approving Fire Station 50 Conditional Use
- Reso. Approving Fire Station 50 Site Development Plan Amend.
- Reso. Approving Use of City Property For Temporary Parking
- Reso. Approving Easement Vacation At 1711 Ludlow Road

### Council Matters/Inquiries

- Vacation Rental Legislative Proposals
- Sovereign Immunity Preemption Legislative Proposals
- Home Business Regulation Legislative Proposal
- Marco Island Community Park Foundation
- MICA Restrictive Covenants

- San Marco Planned Unit Development
- Veterans' Park Construction Management Agreement
- Station 50 Construction Management Agreement

#### Planning Board

- Veterans' Community Park Site Development Plan
- San Marco Planned Unit Development
- Comprehensive Plan Update Amendment
  - Future Land Use And Transportation Elements
- Island Plaza Parking Maintenance Agreement

#### Code Enforcement

- February Hearings (46 Cases)
- Citation Enforcement
- Miscellaneous Matters

#### Miscellaneous Police and Fire Labor and Employment Matters

- Arbitration Hearing And Petition To Stay - Officer Untruthfulness And Neglect Of Duty
- Arbitration Hearing – Drug Screen and Medical Exam
- Petition to Vacate Arbitration – Officer Qualifications

#### Litigation Matters

- ***Picayune Strand/Belle Meade Acquisition by South Florida Water Management District*** (File No. 2016-028-106).  
The subject 162 Acre parcel is owned by the City to be used as an alternate reliability water wellfield source should the City's Henderson Creek/Marco Lakes water source facility become disabled, contaminated or otherwise be unavailable to the City as its current water supply source. A joint meeting was held with SFWMD Officials On February 24, 2017 to discuss possible options. This matter remains open, pending formal action by the District.
- ***Osborn v. City of Marco Island And Braun.***  
This is a matter involving a trip-and-fall at a displaced sidewalk. The insurance adjuster for the co-defendant homeowner contacted us to find out information. It appears that a section of the sidewalk settled, significantly, over a back-filled trench following a sewer project in 2012. The work was performed by a City contractor who agreed pursuant to the contract to defend and indemnify the City. The contractor has rejected the initial tender of defense, asserting that it turned over the sidewalk to the City and it has no further obligation.

The relevant documents were provided to the insurance adjuster. No lawsuit has been served against the City at this time, but a notice of intent required by Florida Statutes Section 768.28 was sent to the City on January 27, 2017 and the plaintiff has sent demand letters to potential defendants, including the City. The claimed date of loss is December 29, 2016. We will continue to monitor this action as warranted.

- ***Wienclaw v. City of Marco Island, et. al. (PGIT Claim #351992).*** Plaintiff claims to have tripped and fallen on a cracked sidewalk located in front of 124 Landmark Street. Plaintiff is said to have hit her head and suffered a large contusion on her forehead, along with neck and back pain, mental anguish, disability, disfigurement, permanent and significant scarring, medical expenses, etc. The homeowners were brought in as co-defendants. The Complaint has been answered and discovery responded to. Discovery has been exchanged by all parties. Investigative discovery is now under way. Plaintiff's and her husband's depositions have been taken. Discovery responses are still trickling in. This case was continued from the April trial docket to the July-August trial docket – Mediation is now scheduled for March 31, 2021. We are in the process of coordinating Plaintiff's independent medical examination.
- ***Cristena B. Yeutter, as Trustee v. City of Marco Island ("City")*** Bert J. Harris Act Claim (PGIT Claim # 347250).  
The Trustee owns the residential property located at 764 Hull Court, Marco Island, Florida ("property"). In 1989, a dock was constructed on the property, and in 1992 a single-family residence was constructed on the property. In 2005 the residence on the property was demolished, leaving the dock as the only remaining improvement on the property. The City cited the Trustee for a code violation under section 54.110. To cure the code violation, the Trustee would either have to construct a single-family residence on the property or would have to demolish the dock. On December 26, 2018, the City received a section 70.001, Florida Statutes ("Bert Harris Act") notice from the Trustee claiming that the City's application of section 54.110 to the property burdens the Trustee's alleged right to maintain the boat dock on the property, which the Trustee claims is a legal non-conforming use because the dock was constructed in 1989. The claim has been submitted to the City's insurance carrier, and the City is developing a response to the claim. Trustee's counsel did submit a proposed settlement agreement, the City Attorney and City Manager have evaluated the proposal and offered alternatives to the Trustee's counsel; however, these discussions were not worthwhile. A Statement of Allowable Uses and settlement offer were emailed on June 21, 2019 and received June 24th, 2019. There has been no further activity to date.

- ***Dayton, Regina L. and Ray Seward v. City of Marco Island, Florida, et.al*** (PGIT Claim #'s 366085 and 36608).  
Plaintiffs sued the City and City Council Chairman Erik Brechnitz based on events at the January 21, 2020 City Council meeting for alleged First Amendment violations, pursuant to 42 U.S.C. § 1983. Plaintiffs claim that Chairman Brechnitz prevented them from speaking about City Councilman Larry Honig during the public comment portion of the meeting, which they allege violated their First Amendment Rights. Plaintiffs filed the action in state court and, following service of the Defendants on April 15, 2020, the Defendants removed the case to the United States District Court for the Middle District of Florida. We filed a motion to dismiss the case on behalf of both the City, for failure to state a claim, and the Chairman, based on qualified immunity. The Court granted the motion to dismiss on May 26, 2020, without prejudice, directing Plaintiffs to file an amended complaint on or before June 9, 2020. Plaintiffs filed an amended complaint naming Chairman Brechnitz as the sole Defendant. Chairman Brechnitz filed an answer and affirmative defenses, as well as a motion to strike the punitive damages pled in the amended complaint. Plaintiffs then filed an avoidance to the affirmative defenses, which the Court struck from the docket as improper. Plaintiffs have now filed a motion to strike Chairman Brechnitz, and he will be filing a response in opposition. The parties have held their initial case management conference, and the Magistrate Judge held a telephonic preliminary pretrial conference on June 30, 2020. A scheduling order was entered setting this matter for trial on the trial docket beginning January 3, 2022. The parties have exchanged their initial disclosures, and discovery is on-going.
- ***Delcor Development, LLC & Southdale, Inc. v. City of Marco Island***, In the Circuit Court of the Twentieth Judicial Circuit In and For Collier County, Florida, Appellate Division. This matter is a petition for writ of certiorari filed in the Appellate Division, filed on April 14, 2020. It challenges City Council's quasi-judicial decision to uphold a decision of the Community Development Director concluding that the petitioners' use permit and site development plan had expired. The Court issued an order to show case directing the City to respond, and the City's response was filed on August 4, 2020. The Petitioner filed a Motion for Extension to File a Reply Brief which was approved by the Court. The Reply Brief was filed when due on October 1, 2020. Petitioners requested oral argument which was held on January 28<sup>th</sup>, 2021. The Collier County Circuit Court Judge sitting as the appellate judge issued a ruling that has caused us confusion and concern, the City filed a Motion for Clarification on February 3, 2021. The Judge questioned whether the City was required, pursuant to Section 166.033(1), Florida Statutes, to issue a written findings of fact supporting the Community Development Directors determination that the conditional approval and site plan had in fact expired. A hearing on the City's Motion for Clarification has been scheduled by the Court to

be heard on March 10, 2021. On March 5, 2021 the Petitioner's filed a Response and Objection to the City's Motion.

- ***Maria Bachich v. Altin Nazarko, Individually, Hideaway Beach Association, Inc., and the City Of Marco Island (Civil Action Case No. 20- CA-2065).***

The City has been sued by Maria Bachich, a former member of the planning board. The suit concerns the construction of a home behind her home in Hideaway Beach. She claims that the new construction does not conform to the City code, does not conform to Hideaway Beach's architectural design requirements, and does not comply with a storm water permit issued by the South Florida Water Management Department to Hideaway Beach.

The City after investigating the claims found no violations of code. The City does not enforce the architectural design requirements of the Homeowners' Association and does not enforce Water Management permits. A court may not review decisions made by the City concerning the enforcement of its code or inspections without some allegation that there has been a constitutional violation. There is case law holding that the City is not subject to injunctive relief concerning code enforcement and, accordingly, has moved to dismiss the case. The City's Motion to Dismiss was scheduled to be heard November 5, 2020; however, the principle parties entered into settlement discussions and we agreed to postpone formal actions for this purpose. The parties have exchanged their initial disclosures and subject to settlement discovery will proceed.

- ***Stephen Harvey v. City of Marco Island*** (Johns Eastern Claim #1007852).

Claimant's attorney filed a petition for benefits on August 24, 2020. The requested benefits have been authorized and we anticipate that the Claimant's attorney will be withdrawing the petition or filing a notice of resolution of issues. Because of the filing of the petition, the Court has set a Final Hearing for January 25, 2021. Mediation held on October 30, 2020, resulted in an impasse determination.

Recently, we have reached a global settlement agreement during a private mediation conference. The material terms of the agreement required the claimant's resignation effective January 31, 2021 and execution of a general release in exchange for payment of \$40,000. We are awaiting receipt of the settlement documents and court approval.

- ***Scott Edson v. City of Marco Island*** (Johns Eastern Claim #90223).

There is currently no pending litigation in this workers compensation matter which arises from a chemical exposure accident. Previously, the claimant filed petitions for benefits which prompted a court ordered mediation. After two rounds of mediation, we were unfortunately unable

to enter a complete settlement agreement and the claim remains open. Claimant is continuing to receive medical care and temporary disability benefits. We are continuing efforts to reach a washout settlement agreement to close the Claim.

### Risk Protection Orders

- ***In Re: Risk Protection Order Marco Island Police Dept. v. Jonathan Deak.***

On November 15, 2019, Jonathan Deak expressed to family a threat to kill himself, and to shoot his girlfriend. Mr. Deak was Baker Acted by the Police. Final Orders of Protection were granted by the Court. We will continue to monitor for compliance. We have assembled evidence to move for extension and will be filing a Petition for Extension of RPO this month. The final order was extended for another year. City will monitor compliance.

- ***In Re: Risk Protection Order Marco Island Police Dept v. Lawrence Oswald.***

Mr. Oswald, a 91 year old resident of Marco Island, was arrested for Aggravated Assault with a firearm after he pointed a handgun at his home healthcare nurse in a threatening manner. The Judge denied the temporary risk protection order. A hearing in pursuit of a final risk protection order was held and the final order was extended for an additional year. City will monitor compliance.

WSH Legal Services Billings Summary  
Bills Dated February 16, 2021 for January 2021 Legal Services

2914.001	Retainer	Inv. # 237498	\$10,000.00
2914.002	Building	Inv. # 237499	\$176.00
2914.003	Labor and Employment	Inv. # 237500	\$3,637.63
2914.003-6	Thompson, Tige – Employment Matter	Inv. # 237501	\$ 550.00
2914.003-8	Derrig, John – Grievance Re Termination	Inv. # 237502	\$ 821.00
2914.004	Public Works	Inv. # 237503	\$ 605.41
2914.006	Miscellaneous Matters	Inv. # 237504	\$ 1,475.60
2914.007	Planning & Zoning	Inv. # 237505	\$ 3,014.00
2914.008	Code Enforcement	Inv. # 237506	\$ 2,376.00
2914.021	Rodriguez, Sonia and Coastal Concrete Products	Inv. # 237507	\$ 220.00
2914.025	Tremont, Peter Domenick – Risk Protection Order	Inv. # 237509	\$ 88.00
2914.028	Community Parks Foundation	Inv. # 237511	\$ 5,632.00
2914.029	Deak, Jonathan Attila – Risk Protection Order	Inv. # 237512	\$ 44.00
2914.030	Cook, Everett J. – Risk Protection Order	Inv. # 237513	\$ 44.00
2914.031	Medical Arts Center of Marco Island – Purchase of 1310 San Marco Rd	Inv. # 237514	\$ 9.02
2914.032	Oswald, Lawrence Howard – Risk Protection Order	Inv.# 237515	\$ 2,684.00

2914.035	COVID-19 Pandemic	Inv. # 237516	\$ 462.00
2914.041	Vacation Rentals	Inv. # 237518	\$ 5,622.75
2914.042	Conner, Steve	Inv. # 237519	\$ 44.00