



## MEMORANDUM

To: City Council, Marco Island, Florida

From: Alan L. Gabriel, City Attorney

A handwritten signature in blue ink, appearing to read 'Alan L. Gabriel', is written over the printed name.

Copy to: Michael A. McNees, City Manager

Re: City Attorney Matter Review for  
December 6, 2021 Council Meeting

Date: November 29, 2021

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During the period commencing from October 25, 2021 through November 29, 2021, the City Attorney has participated in or has been working on the following matters:

### General City Business

- o Miscellaneous Public Records Requests
- o Caxambas Park

### For Council Agenda Approval

- o Ethics Training For Elected Officials Workshop
- o Election Of Chair And Vice Chair
- o Ordinance 2<sup>nd</sup> Reading Amending Drive Thru Signage
- o Ordinance 2<sup>nd</sup> Reading Amending LDC Permitting Permanent Makeup
- o Ordinance 2<sup>nd</sup> Reading Amending Noise Enforcement
- o Ordinance 1<sup>st</sup> Reading Permitting Synthetic Turf
- o Resolution Amending Growth Management Fee Schedule
- o Resolution Adopting Quasi-Judicial Proceedings

### Council Matters/Inquiries

- o Veterans Community Park Development
- o Marco Shores Surplus Property
- o Appeal Of Boat Dock Extension At 986 Sundrop Court
  - Quasi-Judicial Procedures
  - Review Of Documents For And In Opposition To Appeal
- o Vacation Rental Registration
- o Noise Regulations

- o Caxambas Park Uses
- o Out Sourced City Attorney Analysis

#### Planning Board

- o Ord. To Subdivide Tract Into Three Parcels At 40 S. Heathwood Drive
- o Site Development Plan For San Marco Tract B & C PUD At 40 S. Heathwood Drive
- o Comprehensive Plan 2040 Amendment To Ten-Year Water Supply Facilities Work Plan And Adopting a Property Rights Element

#### Code Enforcement

- o November Hearings (34 Cases)
- o Miscellaneous Code Enforcement Matters

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

- o Fire Labor Negotiations
- o Arbitration Hearing And Petition To Stay - Officer Untruthfulness And Neglect Of Duty
- o Arbitration Hearing - Drug Screen and Medical Exam

#### 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.
- ***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, F.S 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 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.

On November 5, 2021, the Court considering Plaintiff and Defendant's respective Motion for Summary Judgment issued its Opinion finding on behalf of then Chairman Brechnitz. In short, the District Court denied Plaintiffs' Motion for Partial Summary Judgment while Defendant's

Motion for Summary Judgment was granted. Judgment was entered for Defendant (Erik Brechnitz) and against Plaintiffs.

- ***Delcor Development, LLC & Southdale, Inc. v. City of Marco Island***. In the Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida (Appellate Division).

This matter is a petition for writ of certiorari filed in the appellate division on April 14, 2020. It challenges the 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 cause, directing the City to respond, and the City's response was filed on August 4, 2020. After obtaining an extension of time, the petitioners filed a reply brief on October 1, 2020. The petitioners requested oral argument, which was held on January 28, 2021. The Collier County Circuit Court Judge Hugh Hayes, sitting as the appellate judge, made oral remarks at the end of the hearing, ostensibly constituting his ruling, but which caused us confusion and concern about what his ruling was. Judge Hayes questioned whether the City was required, pursuant to Section 166.033(1), Florida Statutes, to make written findings of fact supporting its decision to uphold the Community Development Director's determination.

The City filed a Motion for clarification on February 3, 2021, to which Petitioners responded on March 5, 2021. The Court heard oral argument on March 10, 2021, at the conclusion of which Judge Hayes announced he was denying the petition. The City submitted a proposed order, which the Court entered on March 23, 2021. Consistent with Judge Hayes' ruling at the end of the March 10 hearing, the order states that "even if the City was required to comply with Section 166.033, Florida Statutes, its failure to do so constituted harmless error, due to the record of the proceedings before the City Council." On April 7, 2021, the Petitioners filed a Motion for Rehearing, which the Court denied on April 28, 2021.

The Petitioners timely filed a Petition for Writ of Certiorari with the Second District Court of Appeal and, on July 29, 2021, the Court authorized the filing of an Amended Petition for Writ of Certiorari, which was filed on August 2, 2021. On August 12, 2021 the Court issued an Order requiring the City to respond by September 13, 2021 to the pending, amended second-tier Petition for Writ of Certiorari. On October 13th, 2021, the City filed its Response to the Petitioners Amended Petition.

- ***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. This matter has settled, all parties have signed a Settlement Agreement, and the Court has dismissed the action. At this point, we are monitoring the case until the settlement agreement requirements have been satisfied.

- ***Mary Cook v. Crescent Beach Club Condominium Association, Inc., and the City of Marco Island (PGIT Claim No. 372102).***

This matter arises out of an alleged trip and fall on a sidewalk within the City. Plaintiff alleges that, on November 13, 2019, she was walking in the area of 100 N Collier Blvd, Marco Island, when she tripped and fell, allegedly on a displaced sidewalk in front of that address. She claims to have suffered facial lacerations and a fractured right elbow as a result. Subsequent treatment involved surgery to treat the fractured elbow allegedly resulting from this fall. Co-defendant Crescent Beach Club Condominium Association, Inc. ("Crescent") is the owner of the property adjacent to the displaced sidewalk.

Plaintiff initiated this lawsuit on October 6, 2020. Plaintiff filed a Second Amended Complaint—the operative complaint in this matter—on January 24, 2021. The Complaint asserts one count of negligence against Crescent (Count I), and one count of negligence against the City (Count II). On February 2, 2021, the City filed its Answer and Affirmative Defenses ("Answer") to the Second

### Amended Complaint.

Mediation was held on October 13, 2021. As a result of the mediation, the parties have reached a settlement. Subject to the finalization of the agreed settlement documents, this action will be dismissed.

### 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. The final order was extended for another year, and expired on November 19, 2021. Mr. Deak has moved from the City, there are presently no basis upon which to continue the risk protection order. This matter is now closed.

- ***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, and expires on January 21, 2022. City will continue to monitor compliance.

- ***In Re: Risk Protection Order Marco Island Police Dept. v. Ryanna Callery McGuire.***

On May 1, 2021 Ms. McGuire made threats to her family that she was going to kill herself. She has a history of mental health and alcohol use issues. Her husband, who lives in the residence with Ms. McGuire, owns a gun and keeps it in the house. Ms. McGuire was taken to the hospital for observation under Florida's Baker Act. The Respondent and husband agreed to a joint stipulation for entry of a final order, which was issued by the Court on May 18, 2021. This Order expires on May 18, 2022. City will continue to monitor compliance.

- ***In Re: Risk Protection Order Marco Island Police Dept. v. Kerrie Ann Grganto.***

On September 6, 2021 Ms. Grganto alluded to friends that she wanted to end her life. Police were dispatched and found Ms. Grganto unconscious, with a shotgun by her side. After being administered 3 doses of Narcan, the Respondent re-gained consciousness and was taken to the hospital under Florida's Baker Act. Two of three firearms were seized by the Police Department, and the estranged husband is in possession of the third. A temporary Risk Protection Order was granted by the Court. A Final Risk Protection Order was issued by the Court on September 20, 2021 and will expire on September 20, 2022. The City will monitor for compliance.

- ***In Re: Risk Protection Order Marco Island Police Dept. v. Michael Vincent Clausen.***

On September 20, 2021, Mr. Clausen, who was taking medication for psychiatric conditions, experienced recent hallucination events. During an argument with his father, he grabbed for his firearm, which was taken away from him without further incident. Police were called, and Mr. Clausen was committed for evaluation under the Baker Act. The subject firearm is owned by Mr. Clausen, and was taken into protective custody. The Respondent stipulated to the entry of a final risk protection order on October 5, 2021. This order expires October 4, 2022. The City will continue to monitor for compliance and for the need for an extension as the expiration date approaches.

[End of Narrative -- Billing Summary Follows]

WSH Legal Services Billings Summary  
Bills Dated November 9, 2021 for October, 2021 Legal Services

2914.001	Retainer	Inv. # 247495	\$ 10,000.00
2914.003	Labor and Employment	Inv. # 247496	\$ 1,837.37
2914.003-8	Derrig, John – Grievance Re Termination	Inv. # 247497	\$ 697.37
2914.003-9	Thompson, Tige – Second Employment Matter	Inv. # 247498	\$ 1,804.00
2914.006	Miscellaneous Matters	Inv. # 247499	\$ 5,964.10
2914.007	Planning & Zoning	Inv. # 247500	\$ 6,014.01
2914.007-2	Marco Island Hospital; Marco Island Senior Living, LLC; San Marco Planned Unit Development	Inv. # 247501	\$ 968.00
2914.008	Code Enforcement	Inv. # 247502	\$ 1,650.00
2914.009	Litigation – Miscellaneous	Inv. # 247503	\$ 264.00
2914.029	Deak, Jonathan Attila – Risk Protection Order	Inv. # 247505	\$ 198.00
2914.049	Clausen, Michael Vincent – Risk Protection Order	Inv. # 247507	\$ 1,430.00