



MEMORANDUM

To: City Council, Marco Island, Florida
From: Alan L. Gabriel, City Attorney *Alan L. Gabriel*
Copy to: Michael A. McNees, City Manager
Re: City Attorney Matter Review
For August 17, 2020 Council Meeting
Date: August 10, 2020

During the period commencing from July 1, 2020 through July 31, 2020 matters:

General City Business

- Hideaway Beach Agreement
- Permit And Approval Extensions During Pandemic
- Firefighters Training Hold Harmless Agreement
- Consultants' Competitive Negotiation Act ("CCNA") Legislative Amendment
- Miscellaneous Public Records Request(s)
- RWPF Wind Retrofit Documents

For Council Agenda Approval

- Resolution Approving Coast Guard Auxiliary Site Development Plan
- Resolution Approving Variance For Publix Plaza
- Resolution Approving Convenience Fee Rates
- Resolution Approving Coastal Construction Setback Variance
- Resolution Approving Council And Board Use Of Communication Media Technology
- Ordinance Amending Year Round Irrigation
- Evergreen's Generator Bid Protest
 - Hearing Procedures
 - Bid Protest Evidence
 - Protest Procedure Summary
 - Evergreen's Submittal and Memorandum
 - Preparation of City's Protest Hearing Presentation
- Marco Island Academy Sewer Transfer Documents

Council Matters/Inquiries

- Sea Turtle Ordinance
- COVID-19 Pandemic
 - FEMA Public Assistance Grant Agreement
- Use of Communication Media Technology

Planning Board

- Comprehensive Plan Procedure Ordinance
- Havemier Dock Special Permit 899 Caxambas Court
- Bushnell Dock Special Permit 1272 Orange Court
- Schmunk Trust Dock Special Permit 1152 Edington Place
- Jaak Holdings LLC Dock Special Permit 1148 Edington Place
- Sheppard Utility & Drainage Easement Vacation

Code Enforcement

- July 28th Code Enforcement Hearings
- Mitigation of Fine Inquires
- Abandoned or Nuisance Properties
- 910 Ruby Court Lien Status
- Sidewalk Maintenance Enforcement
- Noise Enforcement

Miscellaneous Police and Fire Labor and Employment Matters

- Arbitration Hearing - Officer Untruthfulness And Neglect Of Duty
- Public Records Law And Active Investigations
- Application of Firefighter Cancer Benefit
- Investigative Inquiry Re External Complaint
- Internal Affairs Investigation
- Post-Arbitration Action – Officer Qualifications
- Employee COVID Travel Restrictions and Testing

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.

- *Sonia Rodriguez v. City and Coastal Concrete Products*

On January 23, 2017, the City received notice of a personal injury claim from lawyers representing Sonia Rodriguez. She was allegedly injured on October 7, 2015 in a bicycle accident. The purported cause of the accident is defective construction or lack of construction hazard warnings at a location being worked on by Coastal Concrete. The City was sued on April 20, 2018 after being placed on notice. Because the accident site was within a construction area being managed by Coastal Concrete under contract with the City, we placed Coastal Concrete and its insurer on notice of the claim and, now, the lawsuit, expecting them to defend it and indemnify the City.

The City has approved defense counsel appointed by Amerisure, the insurance company for Coastal Concrete. Coastal has undertaken the City's defense as required by the contract. The City Attorney will serve as the client contact for the insurance defense counsel going forward.

The Court has entered an Order Granting Stipulated Dismissal, without prejudice, of Cross Claim against Coastal Concrete. We will continue to monitor this action as warranted.

- *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 a 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 propounded upon Plaintiff, and City is awaiting responses. Discovery has been exchanged by all parties. Investigative discovery is now under way. By Court Order this case is now scheduled to be on the April 12, 2021 trial docket.
- *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.
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- *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. Petitioners have requested oral argument, but the Court has not yet decided whether it will allow it.

- *Scott Edson v. City of Marco Island* (Johns Eastern Claim #90223)
Claimant has filed a new Petition for Benefits which required an Order Setting a State Mediation, Pretrial and Final Hearing. The State Mediation has been substituted with a private mediation, which has been scheduled for August 24, 2020, at which time we will try to reach an agreement to washout the entire claim.
- *Maria Bachich v. Altin Nazarko, Individually, Hideaway Beach Association, Inc., 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 stormwater 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.

Risk Protection Orders

- *In Re: Risk Protection Order Marco Island Police Dept. v Tremont*
Tremont Risk Protection Order, the Respondent was recently Baker Acted again, and an affidavit attesting to such was filed with the court, for their consideration when time comes for the expiration of the final order. Update: The mother of Respondent Tremont recently took out a restraining order protecting her from harm from the Respondent. A copy of the Restraining Order was filed with the Risk Protection Order Court, for evidence of City's Motion for Extension of the Risk Protection Order, which Order was extended for another year. We will continue to monitor this matter as warranted.

- *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. Temporary, then Final Orders of Protection were granted by the Court. We will continue to monitor for compliance.

- *In Re Risk Protection Order Marco Island Police Department v. Everett J. Cook.*

Mr. Cook, who suffers from dementia, and multiple health issues for which he takes multiple medications, threatened to kill himself. He owns several firearms. Police were called, they Baker Acted Mr. Cook, and took his firearms in for safekeeping. The Court granted Temporary and Permanent Risk Protection Orders. Police will monitor compliance with Court Order for the coming year.

- *In Re: Risk Protection Order for 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 is scheduled for February 11, 2020. A final risk protection order was issued. City will monitor compliance.

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WSH Legal Services Billings Summary
Bills Dated July, 2020 for June 2020 Legal Services

2914.001	Retainer	Inv. #230222	\$10,005.90
2914.002	Building	Inv. #230223	\$484.00
2914.003	Labor and Employment	Inv. #230224	\$5,633.22
2914.003-6	Thompson, Tige - Employment Matter	Inv. #230225	\$2,684.00
2914.003-8	Derrig, John – Grievance Re Termination	Inv. #230226	\$396.00
2914.006	Miscellaneous Matters	Inv. #230227	\$2,488.80
2914.007	Planning	Inv. #230228	\$2,024.00
2914.008	Code Enforcement	Inv. #230229	\$2,200.00
2914.036	Hideaway Beach	Inv. #230232	\$1,386.00
2914.037	Evergreen	Inv. #230233	\$4,884.00