



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 placed over the printed name.

Copy to: Michael A. McNees, City Manager

Re: City Attorney Matter Review for
April 19, 2021 Council Meeting

Date: April 12, 2021

During the period commencing from March 25, 2021 through April 9, 2021 the City Attorney has participated in or has been working on the following matters:

General City Business

- Miscellaneous Public Records Requests
- Vacation Rentals
- Standby Emergency Generators
- Medical Arts Building Lease Termination(s)

For Council Agenda Approval

- Ordinance Approving San Marco Planned Unit Development (PUD)
- San Marco PUD Declaration of Restrictive Covenants
- San Marco PUD Park Agreement

Council Matters/Inquiries

- Comprehensive Plan Workshop
- 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

- Isle of Capri Utility Service Area
- American Rescue Plan Act
- Alternative Impact Fee Calculations Regulations

Planning Board

- San Marco Planned Unit Development and Related Matters
- Comprehensive Plan Update Amendment
 - Future Land Use And Transportation Elements
 - Housing, Conservation, Coastal Management, and Intergovernmental Coordination Elements
- Island Plaza Parking Maintenance Agreement
- Conditional Use Approval For Recreational Vehicle Garage Door

Code Enforcement

- March Hearings (43 Cases)
- Citation Enforcement
- Miscellaneous Matters
- Marco Lake Property Issues

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 was held on March 31, 2021. The parties are discussing the terms of a proposed settlement which, if accepted, will result in the dismissal of this claim.
- ***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, 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 Petitioner filed a Motion For Clarification with the Court, the Court has yet to respond to this 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 for March 2021 Legal Services have not yet been issued. The Summary for March Services will be included in the May 17, 2021 Matter Review Summary

2914.001	Retainer	Inv. #	
2914.003	Labor and Employment	Inv. #	\$
2914.003-6	Thompson, Tige – Employment Matter	Inv. #	\$
2914.003-8	Derrig, John – Grievance Re Termination	Inv. #	\$
2914.003-9	Thompson, Tige – Second Employment Matter	Inv. #	\$
2914.004	Public Works	Inv. #	\$
2914.006	Miscellaneous Matters	Inv. #	\$
2914.007	Planning & Zoning	Inv. #	\$
2914.008	Code Enforcement	Inv. #	\$
2914.028	Community Parks Foundation	Inv. #	\$
2914.032	Oswald, Lawrence Howard – Risk Protection Order	Inv.#	\$
2914.035	COVID-19 Pandemic	Inv. #	\$
2914.041	Vacation Rentals	Inv. #	\$