



MEMORANDUM

To: Marco Island City Council

From: Alan L. Gabriel, Esq., City Attorney

Subject: Nullification of City Ordinance #2022-28

Date: September 26, 2023

The 2023 Florida Legislature adopted a number of new initiatives relating to natural emergencies. Senate Bill 250 was enacted as Chapter 2023-304 Laws of Florida which was signed by the Governor on June 28, 2023. (See attached Senate Bill 250) Of the utmost interest to the City of Marco Island is a new provision relating to enforcement. Specifically, Section 14 (1) of Senate Bill 250 states that a “municipality located entirely or partially within 100 miles of where either Hurricane Ian or Hurricane Nicole made landfall shall not propose or adopt any moratorium on construction, reconstruction or redevelopment of any property damaged” by either hurricane, nor may a municipality “propose or adopt more restrictive or burdensome amendments to its comprehensive plan or land development regulations”. Further, the Act specifies that a municipality within either hurricane zone shall not propose, review, approve, or issue a site plan, a development permit or development order “before October 1, 2024”. Not only does the enforcement language apply to future land development restrictions in the affected areas, the Legislature declared that any such moratorium, restrictive or burdensome comprehensive plan amendment, land development regulation or procedure “applies retroactively to September 28, 2022” and “shall be null and void ab initio”.

As a result, the above enacted Laws of Florida nullifies and voids the City’s Ordinance #2022-08 (the Vacation Rental Registration Program Ordinance), which

was passed and adopted by City Council on December 5, 2022. It should also be noted that City Resolution 2023-21 extended the date for enforcement of this Ordinance from June 30, 2023 to January 8, 2024.

City Council retained outside legal counsel to offer additional guidance as to the pending vacation rental litigation against the City challenging the validity of the City Ordinance. Additionally, outside counsel was tasked with examining the recently-adopted state enforcement provisions and offer advice concerning its applicability to the Vacation Rental Registration Ordinance. Outside counsel concluded that based on the date of adoption (December 5, 2022) and the scope of the Registration Ordinance, the City's Vacation Rental Registration Program establishes a set of more restrictive or burdensome land development regulations, and therefore, is nullified, voided, and preempted under state law.

Before presenting the best available options to the City insofar as treating this nullified ordinance is concerned, I would like to provide you with the definition of "void ab initio." According to Westlaw, "void ab initio" means the act itself (the Nullified Ordinance) had no legal effect from inception and such an act cannot be verified or validated. Since the Nullified Ordinance and the subsequent Resolution were adopted within the timeframe set forth in the enacted Laws of Florida, both enactments are void ab initio and never had legal effect. At the time City Council approved the Vacation Rental Registration Ordinance as dictated upon the favorable vote by the City's voters, state law banning more restrictive land development regulations did not exist.

It is essential to put the public and other stakeholders on notice that state law has preempted City Ordinance No. 2022-08, and as such is nullified. One approach is to draft an ordinance repealing the nullified code section(s). Under this approach, the repealing ordinance will be heard by City Council twice as required in the adoption of any other ordinance, with public participation permitted at both readings. Although repealing a preempted ordinance is a ministerial act, the public would have the right to offer comments about the vacation rental registration program in general or on specific registration provisions contained within the nullified ordinance. However, regardless of public input on the matter, Council would have no choice but to repeal the Nullified Ordinance. Once approved, Municode should be notified to repeal the nullified code section(s).

Another alternative to accomplish the objective of nullifying the Nullified Ordinance without officially repealing it would be for City Council to pass a resolution directing City staff to instruct the Municode Corporation to place an Editor's Note at the end of the applicable code section(s) indicating that the section(s) has been nullified by operation of law. For example the note may state that:

Please be advised that the above and foregoing Section of the City Code has been nullified by operation of law as a result of being preempted by Chapter 2023-304 Laws of Florida. Accordingly, the City Code Section is null and void and is not enforced by the City.

The obvious difference between this approach and the first option is that a resolution is only heard by the City Council once, but does afford the public the opportunity to participate as well. Although the resolution is merely a directive to the City Manager or designee to notify Municode that the Ordinance is nullified by state law, the public would have the right to comment on broader vacation rental issues.

Either approach as described above will signify that City Council recognizes the vacation rental registration program is null and void until no earlier than October 1, 2024, at which time the state statute no longer precludes local governments within either hurricane zone from enacting more restrictive and/or burdensome land development regulations.

Based upon the foregoing, it is my recommendation that Council proceed to adopt a resolution as outlined above.

Attachment (1)

CC: Mike McNeas, City Manager



SB 250 FS.pdf