

ORDINANCE 17-01

AN ORDINANCE OF THE CITY OF MARCO ISLAND, FLORIDA, RELATING TO A MORATORIUM ON THE TRANSFER OF DENSITY CREDITS; MAKING FINDINGS; ESTABLISHING A 365-DAY MORATORIUM ON THE SUBMISSION, PROCESSING, AND APPROVAL OF ANY DEVELOPMENT AGREEMENT APPLICATION FOR THE TRANSFER OF DENSITY CREDITS PURSUANT TO THE CODE OF ORDINANCES, OR DEVELOPMENT APPLICATIONS OR DEVELOPMENT ORDERS ARISING THEREFROM; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City of Marco Island, Florida ("City") has adopted regulations to permit the transfer of density rights or density credits from one parcel of land to another parcel of land; and

WHEREAS, those regulations have been codified in the Code of Ordinance of the City of Marco Island, Florida (the "Code"), Sections 30-972 and 38-76; and

WHEREAS, Section 38-76 provides:

Sec. 38-76. - Use and purpose.

(a) A development agreement may be considered and entered into in accordance with the provisions of this article to transfer and limit land use residential densities as follows:

(1) From one waterfront commercially zoned property to another waterfront commercially zoned property; and

(2) From a waterfront commercially zoned property to a commercially zoned property located in the town center mixed use district.

(b) To utilize a development agreement for density transfer, the owner of property, including either the legal or equitable owner of the property:

(1) Must demonstrate to the City that the property in question to receive a density transfer must already possess at least 50 percent of the required density as a prerequisite to purchasing density transfer credits.

(2) May purchase up to 50 percent of the total density credits that the receiving property has from a waterfront commercially zoned property, providing as a condition of approval, that the owner of the property receiving a density transfer must also purchase a minimum

of 30 percent of the transferred density credits from the City, if the credits are available for sale, at the currently established market price.

(3) Must agree that density credits purchased from the City will be retired and will be transferred to the property owner/purchaser of the density credits.

(4) Must agree that credits purchased which were applicable to a specific waterfront commercially zoned property must be used within two years (730 days) of the date of recording of the development agreement approving the transfer of credits, with a possible extension of one year (365 days) with approval from the City Council when the property owner/purchaser of the density credits demonstrates that the extension of time would be in the public interest.

(c) The development agreement, if approved by the City, must be executed by the City, the owner of the property transferring density credits, and the owner of the property receiving density credits. Any mortgagee or other holder of a security interest in the real property transferring or receiving density credits must join in and consent to the development agreement. The development agreement must include a provision that any property transferring development credits to another property relinquishes all rights to the density credits transferred; and

WHEREAS, Section 30-972 provides:

Sec. 30-972. - Transfer of development rights.

An owner of land located within areas designated with the ST overlay, may seek to transfer some or all of the residential development rights from one parcel of land to another parcel located in the urban designated area of unincorporated Collier County, as an alternative to the development. The lands to which the development rights are to be transferred shall be referred to as receiving lands and those lands from which development rights are transferred shall be referred to as sending lands. Owners of eligible sending land seeking to transfer development rights shall adhere to provisions contained in the Collier County Land Development Code; and

WHEREAS, the transfer of density or intensity rights or credits between separate parcels of land may result in development inconsistent with the City's Comprehensive

Plan or development over saturating infrastructure or neighborhoods with density or intensity of development; and

WHEREAS, any ordinance providing for the transfer of development rights must be consistent with the City's Comprehensive Plan. See §163.3194, Fla.Stat.; and

WHEREAS, there is concern that the current regulations relating to the transfer of development credits is, or could be implemented in a manner, not consistent with the Comprehensive Plan; and

WHEREAS, the Planning Board and the City Council have been evaluating the issue and have in regular meetings since September 2016, expressed their concerns and beliefs that, among other issues:

- the existing program may misrepresent the availability of transfer rights; and
- the existing program may create the impression of available density and intensity transfers which densities and intensities would in fact be inconsistent with and in violation of the City's Comprehensive Plan; and
- there are questions as to whether density and intensity sufficient to be transferrable are actually available; and
- without further evaluation, the existing program could permit density and intensity transfers which the current infrastructure is incapable of supporting, thus potentially violating the level of service and concurrency management requirements of the City Code and Comprehensive Plan; and
- the existing program may not provide appropriate guidelines, restrictions or even opportunities which encourage and promote development consistent with the Comprehensive Plan or the City's community vision; and

WHEREAS, the City Council, therefore, hereby determines that the transfer of development credits or rights provisions may be too permissive and might permit the transfer of density credits or rights that are inconsistent with the comprehensive plan or are detrimental to the community aesthetics, economic fabric or infrastructure capacity of the City; and

WHEREAS, the City requires time to review, consider, modify, process for adoption, and implement revised regulations pertaining to the transfer of development density or intensity credits or rights so that the public health, welfare and safety is protected and the aesthetic and visual qualities of the City are further enhanced and are protected from impairment; and

WHEREAS, the City Council finds that a 365 day temporary moratorium on the submission, processing and approval of any application for a development agreement for the transfer of density credits or rights or the transfer of density or intensity credit or

rights for development within the corporate limits of the City is a reasonable period of time; and

WHEREAS, the City Council finds that the 365-day temporary moratorium will allow the City sufficient time to evaluate the benefits, risks and impacts of a system, consider the degree to which such a system is appropriate for the City, and if appropriate, determine the number of density credits that may be transferred, from which type of properties credits may be transferred, to which type of properties density or intensity credits or rights may be transferred, and the impact upon the City's infrastructure, community development and aesthetics, and comprehensive plan, of said density or intensity credit or rights transfers, if any; and

WHEREAS, the City Council finds it is in the best interest of the citizens of the City to minimize and control the adverse effects of density or intensity credit transfers that may result in over development of certain areas of the City; and

WHEREAS, the City wishes to ensure that no density or intensity credit or right transfers occur or are approved during the 365-day period necessary for its staff to study these issues and develop any regulations that may be necessary, so that any resulting regulations that are prepared and implemented will be fully effective in accomplishing the City's lawful purposes; and

WHEREAS, the City seeks to preserve the status quo community conditions and densities during the time period of consideration of regulations relating to density or intensity credit or right transfers; and

WHEREAS, preservation of the status quo while considering pending plan changes or adoption has been recognized as a valid use of the police power. See *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984); *Hunter v. Adams*, 4 Cal.Rptr. 776 (Ct.Appl. 1960); and *Lake Illyria Corp. v. Town of Gardiner*, 352 N.Y.S.2d 54 (App.Div. 1974); and

WHEREAS, this Ordinance seeks to avoid the creation of density or intensity of use that would be nonconforming with either the revision of the Comprehensive Plan or new or revised regulations relating to the transfer of density or intensity rights or credits. *Almquist v. City of Marshan*, 245 N.W.2d 819 (Minn. 1976); and

WHEREAS, a moratorium ordinance to foster orderly growth consistent with the comprehensive plan and to revise applicable regulations is permissible under Florida law. See *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County*, 349 So.2d 667 (Fla. 3d DCA 1977); see also *Franklin County v. Leisure Properties, Ltd.*, 430 So.2d 475 (Fla. 1st DCA), *rev. denied*, 440 So.2d 532 (Fla. 1983); and *Jason v. Dade County*, 37 Fla.Supp. (Fla. 11th Cir.), *aff'd*, 278 So.2d 311 (Fla. 3d DCA 1972); and

WHEREAS, as seen in *WCI Communities, Inc. v. City of Coral Springs*, 885 So.2d 912 (Fla. 4th DCA 2004), a court will not interfere with the legislative act of establishing a temporary moratorium where there is a rational relationship to the City's legitimate general welfare concern; and

WHEREAS, a court should not set aside the determination of public officers in land use matters unless it is clear that their action has no foundation in reason, and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety of the public welfare in its proper sense. *Id.*; and *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990); and

WHEREAS, in enacting a proper moratorium, the City must ensure that there is a rational basis and legitimate governmental purpose for the imposition of a moratorium; and

WHEREAS, the City finds that evaluating the need to revise the density or intensity credit or right transfer requirements to assure consistency with the Comprehensive Plan, determining whether current regulations allow the transfer of too many density credits, determining whether credits may be transferred to proper areas of the City to prevent overdevelopment, preserving the *status quo* of development until revisions are complete, and avoiding the development of nonconforming densities or intensities of use in the interim, demonstrate a rational basis and legitimate governmental purpose for the moratorium Ordinance; and

WHEREAS, it is well-settled that permissible bases for land use restrictions include concern about the effect of the proposed use on traffic, on congestion, on surrounding property values, on demand for City services, and on other aspects of the general welfare. *WCI Communities, Inc.*, 885 So.2d at 915 and *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993); and

WHEREAS, the City is not interfering with either a vested right obtained as a result of a final approved development order from the City or a permit already obtained under the Florida Building Code; and

WHEREAS, the City Council finds that imposing a temporary moratorium until adequate regulations have been developed, considered, revised, or adopted is in the best interest of the health, safety, aesthetics, economic order, and general welfare of the community and the residents of the City; and

WHEREAS, the City Council has determined that this moratorium should be in place until the earlier of 365 days or the adoption or revision of the regulations for the transfer of density or intensity rights or credits; and

WHEREAS, Future Land Use Element Policy 1.1.4.5 provides that “the City shall not unduly restrict existing or future density transfer programs as long as the overall density of the Island is not increased”; and

WHEREAS, the moratorium will not “unduly restrict existing or future density transfer programs” given that the moratorium is of short duration and is intended to insure that any density program does not violate density restrictions in the Comprehensive Plan; and

WHEREAS, on March 3, 2017, this Ordinance was heard and recommended by the City Planning Board, in its capacity as the City's Local Planning Agency, finding this Ordinance to be consistent with the City's Comprehensive Plan; and

WHEREAS, after due notice and hearing, the City Council finds that this moratorium on the transfer of density credits is appropriate, and consistent with the City's Comprehensive Plan.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MARCO ISLAND, FLORIDA:

SECTION 1. Recitals. The foregoing recitals are hereby ratified and incorporated as the legislative intent of this Ordinance.

SECTION 2. Moratorium Imposed; Applicability.

(a) Based upon the foregoing, there is hereby imposed a temporary moratorium on the submission, processing or approval of any application for:

(1) The transfer of density rights or credits pursuant to Sections 30-972 or 38-76 of the Code, or development applications, or land use development orders for or related to the transfer of density credits pursuant to Sections 30-972 or 38-76 of the Code; or

(2) The transfer of density or intensity rights or credits pursuant to an application for a development order from one parcel of land to another parcel of land.

(b) All activities relating to such applications for the transfer of density rights or credits are temporarily suspended in order for the City, through its officials and staff, to have adequate time and opportunity to review studies and to determine the appropriateness and adequacy of regulations and application criteria, standards and other approval processes related to the potential issue of said approvals and permits within the City relating to the transfer of density or intensity rights or credits.

(c) During the time that the temporary moratorium is in effect, the City shall accept no applications in any way related to the transfer of density rights or credits

pursuant to Sections 30-972 or 38-76 of the Code.

(d) This moratorium is not effective with regard to, or in any way related to the clustering of density or intensity of use within a project determined by the City to be a PUD pursuant to Sections 30-63 and 30-381 through 30-388 of the Code, provided that beyond the clustering of density or intensity as permitted within a PUD, no transfer of density or intensity pursuant to Sections 30-972 and 38-76 is considered.

SECTION 3. Term. The moratorium imposed by this Ordinance is temporary and, unless dissolved earlier by the City, shall automatically dissolve in 365 days from the effective date of this Ordinance. Further, the moratorium shall automatically dissolve upon the adoption of or revision of regulations relating to the transfer of density or intensity of use rights or credits, the formulation and adoption of which shall be expeditiously pursued. The moratorium may be reasonably extended, if necessary, by Ordinance of the City Council.

SECTION 4. Construction. This Ordinance is to be liberally construed to accomplish its objectives.

SECTION 5. Severability. Should any provision of this Ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not affect the validity of the Ordinance as a whole, or any part thereof, other than the part declared to be invalid.

SECTION 6. Non-Inclusion in Code of Ordinances. Given the temporary nature and effect of this ordinance, this Ordinance shall not be codified.

SECTION 7. Effective Date. This Ordinance shall be effective on January 9, 2017, the day that the City Council first took official action to consider this Ordinance in accordance with *Smith v. City of Clearwater*, 383 So.2d 681 (Fla. 2d DCA 1980), *rev. dismissed*, 403 So.2d 407 (Fla. 1981).

ADOPTED BY THE CITY COUNCIL OF THE CITY OF MARCO ISLAND this 6th day of March 2017.

ATTEST:




Laura M. Litzan, City Clerk

CITY OF MARCO ISLAND, FLORIDA
By: 

Larry Honig, Chairman

Approved as to form and legal sufficiency:



Alan L. Gabriel, City Attorney

