

ORDINANCE NO. 21-__

AN ORDINANCE OF THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA, CREATING CHAPTER 9, TITLED “PUBLIC NUISANCES,” AUTHORIZING A SPECIAL MAGISTRATE TO PRESIDE OVER NUISANCE ABATEMENT CASES AND IMPOSE FINES AND OTHER NONCRIMINAL PENALTIES PURSUANT TO SECTION 893.138, FLORIDA STATUTES; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR SEVERABILITY; PROVIDING FOR CONFLICTS; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town of Cutler Bay (the “Town”) desires to broaden its administrative remedies to address certain violations that diminish the health, safety and welfare of its residents; and

WHEREAS, Section 893.138, Florida Statutes, authorizes local governments to create administrative boards or special magistrates with authority to impose fines and other noncriminal penalties in order to deter nuisances as described in subsection (2) of said statute; and

WHEREAS, properties that become public nuisances due to the continuous presence of certain illegal activities significantly diminish property values for property owners within the Town and in adjacent jurisdictions; and

WHEREAS, the Town finds that in order to intervene and cure properties that have become public nuisances, the Town must have the appropriate mechanisms to afford property owners due process and notice of the presence of a public nuisance located in their property; and

WHEREAS, the Town desires to adopt a nuisance abatement process and utilize a special magistrate or board with the power to issue orders that mitigate and cure the effects of a public nuisances within privately owned properties within the Town; and

WHEREAS, the Town Council finds that this Ordinance is necessary for the preservation and improvement of the environment, public health, safety and welfare of the Town.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND TOWN COUNCIL OF THE TOWN OF CUTLER BAY, FLORIDA AS FOLLOWS:

Section 1. **Recitals.** The above-stated recitals are true and correct and are incorporated herein by this reference.

Section 2. **Creating Chapter 9 of the Town Code.** The Town Council of the Town of Cutler Bay hereby creates Chapter 9, "Public Nuisances" of the Town Code as follows:

Chapter 9 – PUBLIC NUISANCES

Section 9-1. Definitions.

Complaint means the official process by which cases are initiated and brought before the nuisance abatement special magistrate.

Public Nuisance means any place or premises that has been used:

(1) On more than two occasions within a six-month period, as the site of a violation of F.S. § 796.07, as amended, entitled "Prohibiting prostitution and related acts.";

(2) On more than two occasions within a six-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(3) On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(4) By a criminal gang for the purpose of conducting a pattern of criminal gang-related activity as defined by F.S. § 874.03, as amended; or

(5) On more than two occasions within a six-month period, as the site of a violation of F.S. § 812.019 as amended, relating to dealing in stolen property.

(6) On two or more occasions within a 6-month period, as the site of a violation of chapter 499, Florida Statutes, as amended, may be declared to be a public nuisance,

¹ Coding: ~~Strikethrough~~ words are deletions to the existing words. Underlined words are additions to the existing words. Changes between first and second reading are indicated with yellow highlighted ~~double strikethrough~~ and double underline.

and such nuisance may be abated pursuant to the procedures provided in this section.

(7) Any pain-management clinic, as described in sections [458.3265](#) or [459.0137](#), Florida Statutes, as amended, which has been used on more than two occasions within a 6-month period as the site of a violation of:

(a) Sections [784.011](#), [784.021](#), [784.03](#), or [784.045](#), Florida Statutes, as amended, relating to assault and battery;

(b) Section [810.02](#), Florida Statutes, as amended, relating to burglary;

(c) Section [812.014](#), Florida Statutes, as amended, relating to theft;

(d) Section [812.131](#), Florida Statutes, as amended, relating to robbery by sudden snatching; or

(e) Section [893.13](#), Florida Statutes, as amended, relating to the unlawful distribution of controlled substances.

Operator means an owner or person having possession or charge of as agent or otherwise having interest in or control of the building, place or premises.

Section 9-2. Nuisance Abatement Special Magistrate.

(a) The special magistrate shall possess an outstanding reputation for civic pride, interest, integrity, responsibility, and business or professional ability. The special magistrate shall be a member of the state bar in good standing or a retired judge of one of the courts of the state. The appointment of the special magistrate shall be made by the Town Manager on the basis of experience or interest in public nuisance abatement. The special magistrate shall be appointed for a term of two years. The special magistrate may be reappointed at the discretion of the Town Manager. There shall be no limit on the number of reappointments that may be given to any special magistrate; provided, however, that a determination as to removal or reappointment must be made at the end of each of his two-year terms. The Town Manager shall have authority to remove the special magistrate with or without cause. Appointments to fill any vacancy shall be for the remainder of the unexpired term.

(b) The Town shall provide clerical and administrative personnel as may be reasonably required by the special magistrate for the proper performance of his or her duties. The clerk for the special magistrate shall administer an oath to witnesses appearing before the

special magistrate and issue subpoenas in the name of the special magistrate for services of process.

(c) The Town Attorney office shall, when so requested by the Town Manager, represent the Town in the prosecution of a public nuisance. If an appeal hearing is held pursuant to section 9-8, the Town Attorney's office shall, if requested by the Town Manager, represent the Town at such proceedings.

Section 9-3. Procedures.

(a) Written complaint; reports.

(1) Any Town employee, Town officer, or any Town resident may file a written complaint with the Police Department. The complaint shall state facts that reasonably tend to establish the existence of a Public Nuisance as defined by this chapter.

(2) The filing of more than two complaints on any particular place or premises shall cause the Police Department or Code Compliance Division to determine whether the requisite number of occurrences or violations have taken place to constitute a Public Nuisance as set forth in section 9-1.

(3) Any police officer that makes an arrest or substantiates an incident or occurrence of any statutory violation(s) or violations under section 9-1 shall provide a copy of every such report to the Code Compliance Division. The Code Compliance Division and the Police Department shall process all such reports and determine when the requisite number of occurrences or violations have taken place as set forth in section 9-1.

(4) Upon determining that a Public Nuisance exists, the Code Compliance Division shall mail written notice of such Public Nuisance by certified mail, return receipt requested, to the operator of the place or premises complained of at the operator's address as shown in the Miami-Dade County Tax Collector's office for tax notices or to the address listed in the Miami-Dade County Property Appraiser's database. The notice shall provide for the operator to contact the Code Compliance Division within fourteen days of receipt of the notice. This time period is provided to allow the operator to take good faith measures as are appropriate to abate the nuisance. The Code Compliance Division may extend the fourteen days to allow the operator to institute or continue actions to abate the nuisance, provided the actions are reasonable. In the event the operator fails to respond to the notice of complaint or

fails to take reasonable action to abate the nuisance, the Code Compliance Division shall schedule a hearing on the Public Nuisance before the nuisance abatement special magistrate. Written notice of said hearing shall be sent by certified mail, return receipt requested, to the operator and the complainant(s) at least ten days prior to the scheduled hearing.

(b) Processing; review of case.

(1) In each case where such determination has been made in accordance with subsection (a) above, the case shall be processed through the Code Compliance Division and forwarded to the Town Attorney for a determination of whether such case is sufficient for presentation to the special magistrate for consideration and disposition as provided herein.

(2) The Town Attorney upon receipt of verification by the Code Compliance Division that all administrative prerequisites have been satisfied shall direct the Code Compliance Division to prepare a case folder for a complaint related to the maintenance of the public nuisance as defined in section 9-1. Prior to presenting a case to the special magistrate, the Town Attorney shall review the case for legal sufficiency and, if applicable, shall promptly notify the Code Compliance Division of any legal insufficiencies in the case.

(c) Hearings; hearing notices.

(1) The Code Compliance Division shall schedule all hearings and issue hearing notices:

(a) by sending written notice of the hearing by certified mail to the operator's last known address; or

(b) by hand delivery to the operator at the operator's last known address. If an attempt to serve notice upon the operator by hand delivery or certified mail is unsuccessful, service of the notice of the hearing may be made by posting the premises pursuant to F.S. Ch. 48, provided such posting to take place not less than ten days before the scheduled hearing date.

(2) The notice of hearing shall include a:

a. Statement of the time, place, and nature of the hearing;

b. Statement of the legal authority and jurisdiction under which the hearing is to be held;

c. Reference to the particular statutes or ordinances involved; and

d. A short and plain statement of facts summarizing the incidents;

e. A statement on the right of the violator to be represented by a lawyer;

f. A statement on the right of the violator to present witnesses and evidence;

g. Notice that failure of the violator to attend the hearing may result in a binding order upon the violator; and

h. Notice that requests for continuance will not be considered if not received by the special magistrate at least ten calendar days in advance prior to the date set for the hearing.

Section 9-4. Conduct of Hearings.

(a) All hearings of the special magistrate shall be open to the public. The proceedings at the hearing shall be recorded and may be transcribed at the expense of the party requesting the transcript.

(b) Assuming proper notice was provided, a hearing may proceed in the absence of the violator.

(c) The Town Attorney, or designee, shall present each case before the special magistrate on behalf of the Town. All parties shall have the opportunity to present evidence and argument on all relevant issues involved in the case, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel.

(d) At the discretion of the special magistrate, the general public may be given an opportunity to present oral testimony or other evidence. If the special magistrate considers such evidence, then all parties shall be given an opportunity to cross-examine or challenge or rebut it. The special magistrate may consider any relevant evidence, including evidence of the general reputation of the place or premises.

(e) All testimony shall be under oath and shall be recorded. The formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings.

(f) The Town Attorney or designee has the burden of proving the existence of a Public Nuisance by clear and convincing evidence.

(g) Orders of the special magistrate shall be based on competent and substantial evidence.

(e) After considering all evidence, the special magistrate may declare the place or premises to be a Public Nuisances as defined in this chapter.

(f) Upon finding that a Public Nuisance exists, the special magistrate shall immediately order one or more of the following:

(1) Discontinuance of the nuisance;

(2) Closing of the place or premises;

(3) Prohibition of the conduct, operation, or maintenance of any business or activity on the premises which is conducive to the maintenance of the public nuisance, which prohibition may include the suspension of any Town local business tax receipt issued or renewed pursuant to the provisions of Chapter 32, Article III, of the Town Code;

(4) The payment to the Town by the operator of a fine of \$250.00 for an initial finding by the special magistrate of the existence of a public nuisance and \$500.00 for each subsequent finding in, at or on the same premises pursuant to sections 823.01 and 775.083(e), Florida Statutes, as amended; or

(5) Any combination of this subsection.

Section 9-5. Enforcement of Orders

(a) The Town may institute proceedings in a court of competent jurisdiction for willful disobedience or failure to comply with any order of the special magistrate.

(b) The Town Attorney is authorized to initiate proceedings in any county, state or federal forum for the suspension or revocation of any permits, licenses, concessions or contracts held or awarded to the violator including contracts awarded under section 24.112, Florida Statutes, as amended, and including licenses for the sale of beverages issued under section 561.19, Florida Statutes, as amended, where the existence of such permits, licenses, concessions or contracts is conducive to the maintenance of the public nuisance.

(c) Orders of the special magistrate issued pursuant to this chapter shall be posted at the place, building, or premises where the public nuisance exists, existed or is occurring, in violation of the law and shall be sent by certified mail to the owner of record of such place, building, or premises within two business days of the posting.

(d) Five business days after the posting of an order issued pursuant to the nuisance abatement board, Code Compliance Division officers shall be authorized to act upon and enforce such orders in accordance with section 46-5 hereof.

Section 9-6. Costs.

(a) In the event that the special magistrate declares a place or premises to be a nuisance and issues an order pursuant to Section 9-4(f) above, the special magistrate shall assess against the owner of the place or premises the costs which the Town has incurred in the preparation, investigation, and presentation of the case. These costs shall be due and payable ten (10) days after the written order of the special magistrate has been filed. A certified copy of an order imposing costs may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists or, if the violator does not own the land, upon any other real or personal property owned by the violator; and it may be enforced in the same manner as a court judgment by the sheriffs of this state including levy against the personal property, but shall not be deemed to be a court judgment except for enforcement purposes. After one year from the filing of any such lien which remains unpaid, the Town may foreclose or otherwise execute on the lien. Interest shall accrue on the unpaid costs at the legal rate of interest set forth in Section 55.03 of the Florida Statutes, as that may be amended from time to time.

(b) Liens created pursuant to this chapter may be discharged and satisfied by paying to the Town the amount specified in the order, together with interest, administrative costs and recording fees. When any such lien has been discharged, the Town shall issue a satisfaction of lien in recordable form.

(c) With the exception of any development approvals needed to correct a code violation for which the applicant has been cited and notwithstanding any provision of this Code, no Town officer, agent, employee or board shall approve, grant or issue any operating permit, license, building permit, certificate of use and occupancy, platting action, or zoning action to any named violator with:

(1) Uncorrected code violations;

(2) Unpaid civil penalties;

(3) Unpaid administrative costs; or

(4) Unpaid liens;

any or all of which are owed to the Town.

(d) No lien provided under this chapter shall continue for a period longer than 20 years after the certified copy of an order imposing a fine has been recorded, unless within that time an action to foreclose on a lien is commenced in a court of competent jurisdiction. In an action to foreclose on a lien, the prevailing party may recover interest and all costs, including attorneys' fees, incurred in the foreclosure.

Section 9-7. Appeals.

(a) The named violator or the Town may appeal a final order of the special magistrate by filing a notice of appeal in the circuit court in and for the Town, within 30 days of the execution of the order to be appealed and in accordance with the procedures provided by the Florida Rules of Appellate Procedure. Such an appeal shall not be a hearing de novo, but shall be limited to appellate review of the record created by the special magistrate.

(b) Unless the findings of the special magistrate are overturned in a proceeding held pursuant to section 9-7(a), all findings of the special magistrate shall be admissible in any proceeding to collect unpaid penalties.

(c) No party, other than the Town, may apply to the court for relief unless such party has first exhausted the remedies provided for in this chapter and has taken all available steps provided in this chapter. It is the intention of the Town that all steps provided by this chapter shall be taken before any application is made to the court for relief; and no application shall be made by any party other than the Town to a court for relief except from an order imposing civil penalties or continuing violation penalties issued by the special magistrate pursuant to this chapter. It is the intention of the Town that the order reducing the civil penalty or denying a reduction of the civil penalty shall not be subject to appeal or other form of judicial review.

Section 9-8. Rights Preserved.

This article does not restrict the right of any person to proceed under Section 60.05 of the Florida Statutes against any public nuisance.

Section 3. **Inclusion in the Code.** It is the intention of the Town Council, and it is hereby ordained that the provisions of this Ordinance shall become and be made a part of the Code of the Town of Cutler Bay; that the sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions; and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

Section 4. **Severability.** If any section, clause, sentence, or phrase of this Ordinance is for any reason held invalid or unconstitutional by a court of competent jurisdiction, the holding shall not affect the validity of the remaining portions of this Ordinance.

Section 5. **Conflicts.** All Sections or parts of Sections of the Code of Ordinances, all ordinances or parts of ordinances, and all Resolutions, or parts of Resolutions, in conflict with this Ordinance are repealed to the extent of such conflict.

Section 6. **Effective Date.** This Ordinance shall be effective immediately upon adoption on second reading.

PASSED on first reading on the 28th day of October, 2020.

PASSED AND ADOPTED on second reading on the ____ day of January, 2021.

TIM MEERBOTT
Mayor

ATTEST:

Debra E. Eastman, MMC
Town Clerk

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY FOR THE SOLE USE OF
THE TOWN OF CUTLER BAY:

Weiss Serota Helfman Cole & Bierman, P.L.
Town Attorney

First Reading:

Moved by: Council Member Coriat

Second by: Council Member Callahan

Second Reading:

Moved by: _____

Second by: _____

FINAL VOTE AT ADOPTION:

Mayor Tim Meerbott _____

Vice Mayor Michael P. Callahan _____

Council Member Robert “BJ” Duncan _____

Council Member Suzy Lord _____

Council Member Roger Coriat _____