

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS
PUBLIC HEARING / AGENDA ITEM # 9b**

SUBJECT: An Ordinance Amending Chapter Seven of the Flagler County Code of Ordinances to Prohibit Floating Structures in Waters of Flagler County.

DATE OF MEETING: September 6, 2023

OVERVIEW/SUMMARY: The Legislature, pursuant to section 327.60(3), Florida Statutes, has granted local governments the authority to enact and enforce regulations that prohibit or restrict the mooring or anchoring of floating structures. Floating structures are defined in section 327.02(14), Florida Statutes, as “a floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property.” Floating structures are expressly excluded from the definition of a “vessel” under Florida law.

Floating structures are not new to the State where they often serve as vendors of food, alcohol and rentals (e.g., chairs, rafts and other amenities for people using the waterways). In essence, a neighborhood convenience store on the water, which may work in some jurisdictions (e.g., the Crab Island Entertainment Area in Okaloosa County), however, Flagler County’s navigable waterways are narrower than many surrounding areas of the State. Thus, allowance of floating structures in the County’s navigable waterways poses a safety risk to the public utilizing these waters. Additional safety risks associated with floating structures include lack of basic structural or safety equipment requirements since they are not regulated as vessels.

A floating structure’s purpose in providing services, rather than transportation, leads to continuous anchoring to the bottom of the waterway. Many floating structures have no means of transportation at all. Such immobility leads to degradation of the surrounding natural systems from discharges to the marine environment of debris and waste. Furthermore, such lack of mobility poses special risks during emergencies when the need to be mobile is crucial to not only secure the floating structure from damage but preventing damage from occurring to surrounding property.

Requiring floating structures to anchor at public or private marinas or mooring fields significantly reduces these concerns. Similar floating structure ordinances have been adopted by other local governments, including but not limited to, the counties of Duval, Monroe, Palm Beach and St. Johns. Creation of this Ordinance prohibiting floating structures in the waters of Flagler County serves to decrease the potential of damage or injury to the public and the marine environment and is in the best interest of the public.

STRATEGIC PLAN:

Focus Area: Growth & Infrastructure - Goal 2 – Protect and Manage Natural Resources

Focus Area: Public Health and Safety - Goal 2 – Operate a Risk Reduction Program

FUNDING INFORMATION: N/A

DEPARTMENT CONTACT: Al Hadeed, County Attorney 386-313-4005

RECOMMENDATION: Request the Board approve this Ordinance creating Section 7-6. of the Flagler County Code of Ordinances.

ATTACHMENTS:

1. Ordinance
2. Proof of Advertising Legal Notice

ORDINANCE NO. 2023-_____**AN ORDINANCE OF THE FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS AMENDING CHAPTER SEVEN OF THE FLAGLER COUNTY CODE PROHIBITING FLOATING STRUCTURES IN WATERS OF THE COUNTY; PROVIDING FINDINGS; PROVIDING APPLICABILITY; PROVIDING DEFINITIONS; PROVIDING FOR THE PROHIBITION OF FLOATING STRUCTURES IN WATERS OF THE COUNTY; PROVIDING EXCEPTIONS; PROVIDING FOR ENFORCEMENT AND PENALTIES; PROVIDING FOR CODIFICATION AND SCRIVENER'S ERRORS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.**

WHEREAS, pursuant to section 327.60(3), Florida Statutes, counties have the authority to enact and enforce regulations, within their jurisdictions, that prohibit or restrict the mooring or anchoring of floating structures, live-aboard vessels, or commercial vessels, excluding commercial fishing vessels or vessels within marked boundaries of permitted mooring fields; and

WHEREAS, section 327.02(14), Florida Statutes, defines a floating structure as “a floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property; the term includes but is not limited to, an entity used as a residence, place of business or office with public access; a hotel or motel; a restaurant or lounge; a clubhouse; a meeting facility; or a mining platform, dredge, dragline, or similar facility or entity represented as such. Floating structures are expressly excluded from the definition of the term “vessel” provided in this section. Incidental movement upon water or resting partially or entirely on the bottom does not, in and of itself, preclude an entity from classification as a floating structure.” (Emphasis added.); and

WHEREAS, section 327.02(47), Florida Statutes, defines “vessel” as being “synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.”; and

WHEREAS, the United States Supreme Court in *Lozman v. City of Riviera Beach*, 568 U.S. 115, 121 (2013), adopted an objective test for determining whether a structure is a “vessel” within the meaning of 1 U.S.C.A. section 3, determining that if “a[n objective] reasonable observer, looking to” its “physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” By adopting this objective test, the Court eliminated consideration of an owner’s subjective intent in vessel status determinations; and

WHEREAS, anchoring or mooring of floating structures within the County’s waters poses a special risk to persons and property as these structures are usually not self-propelled and cannot be quickly moved during emergencies or critical situations and may be difficult or impossible to timely remove in emergencies without the ability to quickly locate an owner; and

WHEREAS, a floating structure could cause damage to persons or property because they

are not regulated as vessels and thus are not required to meet basic structural or safety equipment standards for their inhabitants or other mariners, such as lighting equipment that would warn other mariners using the waters of the County that present an obstacle to the marine environment; and

WHEREAS, the navigable waterways of the County are narrower than surrounding areas, including the Intracoastal Waterway and the navigable waterways outside of the Intracoastal Waterway, for example, Haw Creek, Bull Creek, the Palm Coast canals and drainage ways, and the allowance of floating structures in navigable waterways poses a safety risk to the public utilizing these waters; and

WHEREAS, a floating structure poses a threat to the environment, human health, and navigational safety as an obstruction to navigation through deterioration, physical damage to the surrounding ecosystems, through the proliferation of marine debris, or the threat of a sewage, oil and/or hazardous substance into the marine environment, including materials left on the floating structure if abandoned, and the potential use of the structure as an illegal dumping site; and

WHEREAS, a floating structure that is anchored or moored at public or private marinas or mooring fields will greatly decrease the potential of damage or injury and protect the health, safety, and welfare of the public and is in the public interest; and

WHEREAS, floating structures are not new to the State where they often serve as vendors of food and alcohol and rentals for beach chairs, rafts and such for people using the waterways;

WHEREAS, section 192.001(17), Florida Statutes, provides, in pertinent part, that “[a] floating structure is expressly included as a type of tangible personal property.”; and

WHEREAS, neither the United States nor the State of Florida have preempted the several states or local governments from legislating in the field of floating structure regulation; and

WHEREAS, Section 1(f), Article VIII, of the Florida Constitution, vests a county with the authority to enact countywide ordinances not inconsistent with general law except an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict; and

WHEREAS, under Florida law, there is no recognized common law, constitutional, or statutory littoral or riparian right to anchor, moor, or otherwise indefinitely or permanently affix or situate a floating structure upon or over waters of the county, including but not limited to upon sovereign submerged lands; and

WHEREAS, the Board finds that the enactment of this Ordinance is necessary to advance the County’s public health, safety, and welfare and to protect the natural environment within the County.

WHEREAS, public notice of the adoption of this Ordinance has been provided in accordance with Chapter 125.66(2)(a), Florida Statutes; and

NOW THEREFORE, be it ordained by the Flagler County Board of County Commissioners as follows:

SECTION 1. FINDINGS

The above recitals are incorporated herein as true and correct and establish the legislative intent of this Ordinance.

SECTION 2. FLAGLER COUNTY CODE OF ORDINANCES AMENDMENT

Section 7-6 of the Flagler County Code of Ordinances is hereby created as follows (additions are shown in underline format, deletions are shown in ~~striketrough~~ format):

Sec. 7-6. – Floating Structures

(a) Applicability.

This section shall be applicable within the incorporated and unincorporated areas of Flagler County, unless a municipality opts out or adopts an ordinance in conflict, in which case this section shall be effective to the extent not in conflict with the municipal ordinance.

(b) Definitions. For the purposes of this section:

Anchor means the use of traditional ground tackle, typically including an anchor, anchor chain, and line, appurtenant to a floating structure, and used to hold a floating structure in place.

Barge has the same meaning as defined in section 327.02, Florida Statutes, as may be amended.

Floating Structure means a floating entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water, but which serves purposes or provides services typically associated with a structure or other improvement to real property. The term includes, but is not limited to, an entity used as a residence, place of business or office with public access, hotel or motel, a restaurant or lounge, a clubhouse, a meeting facility, a storage or parking facility, or a mining platform, dredge, dragline, or similar facility or entity represented as such. Floating structures are expressly excluded from the definition of the term “vessel” as defined in section 327.02, Florida Statutes, as may be amended. Incidental movement upon water or resting partially or entirely on the bottom does not, in and of itself, preclude an entity from classification as a floating structure. Registration of the entity as a vessel in accordance with Chapter 327, Florida Statutes, shall not preclude an entity from classification as a floating structure. In the event of a dispute as to whether an entity constitutes a floating structure versus a vessel, such dispute shall be exclusively determined under a preponderance of the evidence standard, by analyzing the following objective criteria which are attributes of a floating structure: (1) it is incapable of self-

propulsion, (2) it does not have a rudder or other steering mechanism, (3) it does not have a rake hull, (4) it has a rectangular or a square bottom, (5) its draft is not comparable to the drafts of vessels of similar physical size, (6) its documented past geographical movement is infrequent, (7) it cannot be moved over meaningful distances without dangerously or hazardously swinging from side-to-side, (8) it does not have a (lawful) capacity to generate or store electricity, (9) it does not have a bilge pump(s), (10) it does not have an approved marine sanitation device(s), (11) its above water surface area(s) bear similarity to the interior or exterior of a land-based residential or commercial structure, (12) it has ordinary windows, open doorways, or unsealed doors, (13) it does not have any other physical features that might suggest to an objective reasonable observer a design to transport over water anything other than its owns furnishing and related personal effects, and (14) it is not titled and registered as a vessel. Payment of a tangible personal property tax regarding the entity in question or issuance or receipt of a tax exemption thereto, pursuant to section 192.001(17), Florida Statutes, as may be amended, shall constitute prima facie evidence that the entity in question constitutes a floating structure under this section.

Houseboat has the same meaning as defined in section 327.02, Florida Statutes, as may be amended.

Jack-up Rig means a self-elevating unit that is a type of mobile platform that consists of a buoyant hull fitted with a number of movable legs, capable of raising its hull over the surface of the sea.

Lawfully Moored means moored to a mooring ball, mooring buoy, or dock when such mooring is authorized under federal, state, and/or local law(s) and has received all required federal, state, local permits and approvals to so moor.

Live-Aboard Vessel has the same meaning as defined in section 327.02, Florida Statutes, as may be amended.

Marine Facility means an accessory building or structure which is used to take a boat into or out of a water body, to moor, to berth, or to store a vessel or floating structure, but shall not include any building used for human habitation or any boat service, repair or sale facility.

Moor means the act of securing a floating structure in the water by means of a permanent or semi-permanent mooring system affixed to the bottom of the water body. As used in this section, to moor or a mooring shall include other meanings of mooring such as tying off a floating structure to upland vegetation or to pilings, posts, or stakes.

Private Mooring means the act of securing of a floating structure in the water by means of a permanent or semi-permanent mooring system affixed to the bottom of the water body where the bottom is owned by a private person or entity that is not

the local, state, or federal government.

Public Mooring Field means an area within a public body of water where the public can legally secure their floating structure to a mooring buoy that is attached to the bottom of the water body with a permanent anchor.

Vessel has the same meaning as defined in section 327.02, Florida Statutes, as may be amended.

Waters of the County means all portions of those public waters, up to and including the mean high water mark, located within the geographic boundary limits of Flagler County, which waters include waters within the jurisdictional boundaries of a municipality and waters within the jurisdiction of the state, including, but not limited to all navigable and non-navigate waterways, canals, lagoons, bayous, bays, rivers, lakes, streams, springs, impoundments, and all other bodies of water, including fresh, brackish, saline, tidal surface, or underground, and including surface waters created by the removal of soil from uplands, but excluding any area preempted by law.

(c) Prohibition of floating structures.

- (1) It shall be unlawful for any person to anchor, moor, tie off, or otherwise affix a floating structure upon, or to, the waters of the county.
- (2) It shall be unlawful for any person to anchor, moor, tie off, or otherwise affix a floating structure to publicly owned uplands.
- (3) It shall be unlawful for any person, within waters or submerged land included within the waters of the county, to anchor, moor, tie off, or otherwise affix a floating structure to one or more plant species protected by federal, state, or local law(s), rule(s), or regulation(s) pursuant to an endangered, threatened, or species of special concern designation or listing.
- (4) It shall be unlawful for any person, within waters or submerged lands included within the waters of the county, to anchor, moor, tie off, or otherwise affix a floating structure to one or more plant species (including, but not limited to, mangroves) whose defoliation or destruction is subject to special permitting requirements under the Florida Mangrove Trimming and Preservation Act, codified at sections 403.9321-403.9333, Florida Statutes, as may be amended or supplemented.
- (5) It shall be unlawful for any person to construct, place, or maintain a floating structure or proximately cause or proximately contribute to the construction, placement or maintenance of a floating structure in violation of this section.
- (6) It shall be unlawful for any person to store items upon, occupy, or reside upon

a floating structure within waters or submerged lands included within the waters of the county or publicly owned uplands.

(7) Any municipality that later adopts this section in an ordinance may independently enact its own separate-and-distinct subsection of enumerated prohibitions.

(d) Exceptions.

(1) This section shall not apply to floating structures lawfully moored in a permitted public mooring field. As used herein, “lawfully moored in a permitted public mooring field” means moored to a mooring ball or mooring buoy that is authorized under federal, state, and local law(s), which has received all required federal, state, and local permits and approvals, and which is situated within a mooring field managed by a local government.

(2) This section shall not apply to floating structures lawfully moored in a permitted private mooring. As used herein, “lawfully moored in a permitted private mooring” means a moored to a mooring ball or mooring buoy when such mooring is both authorized under federal, state, and local law(s), and has received all required federal, state, and local permits and approvals to so moor.

(3) This section shall not apply to a floating structure moored or docked at a lawfully established marina or marine facility. It is the responsibility of the owner(s) or proprietor(s) of lawfully established marinas or marine facilities to ensure that floating structures moored thereto comply with all applicable local, state, and federal proprietary, safety, environmental, and pollution controls laws, rules, and regulations.

(4) This section shall not apply to vessels, including but not limited to, barges, jack-up rigs, houseboats, or live-aboard vessels.

(5) This section shall not apply to floating structures that are lawfully moored or anchored above privately-owned submerged lands.

(6) This section shall not apply to floating structures that are part of a permitted construction project or a permitted dredging activity.

(7) This section shall not apply to a floating structure that federal, state, and local proprietary laws and regulations expressly permit, when such floating structure has received all such required federal, state, and local permits and approvals (such as a floating boat lift or floating vessel platform permitted by the Florida Department of Environmental Protection pursuant to Chapter 403, Florida Statutes, and Chapter 62, Florida Administrative Code, as may be amended, and by all applicable federal permitting agencies), and is in compliance with all conditions of said permits and approvals.

- (8) This section shall not apply to government waterway markers, such as, regulatory markers and aids to navigation (the latter including, but not limited to, channel markers, danger markers, information markers, and aids of no lateral significance).
- (9) This section shall not apply to a waterway marker when that marker is both authorized under federal, state, and local law(s), and when its owner(s) and permittee(s) have received all required federal, state, and local permits and approvals to so place or maintain that waterway marker.
- (10) Any municipality that later adopts this ordinance may independently enact its own separate-and-distinct subsection of enumerated exceptions.

(e) Enforcement and penalties.

- (1) Any law enforcement officer or code enforcement officer acting within his/her jurisdiction is authorized to enforce this section.
- (2) The violation of any provision of this section may be enforced pursuant to section 125.69(1), Florida Statutes, as may be amended, and shall be punishable by a fine not to exceed five hundred dollars (\$500.00) per day, by imprisonment in the county jail not to exceed sixty (60) days, or by both such fines and imprisonment.
- (3) The violation of any provision of this section may be enforced pursuant to the procedures and penalties of Chapter 162, Florida Statutes. The County may initiate an original county or circuit court action, or special magistrate proceeding pursuant to Chapter 162, Florida Statutes. The County may dismantle or remove a floating structure held in violation of this section, and at its sole discretionary election may arrange to store or return it to the rightful owner, upon the owner's payment of all reasonable costs associated with said dismantlement, removal, or storage.
- (4) In addition to the sanctions contained herein, this section may be enforced through any other appropriate legal action, including, but not limited to, seeking cease and desist orders, instituting other administrative actions, and requesting temporary and permanent injunctions to enforce the provisions of this section. It is the purpose of this section to provide additional and cumulative remedies.
- (5) Each day a violation of this section occurs shall constitute a separate offense and be punishable as such.
- (6) Authorized enforcement officers may remove or destroy a floating structure found in violation of this section, in accordance with the following:

- a. When a floating structure is found to be in violation of this section, notice shall be placed upon such floating structure notifying such owner(s), whether known or unknown, that the floating structure is in violation of this section. Owner(s) shall be given twenty-one (21) calendar days from the date of the posting of the notice on the floating structure to remove the floating structure, except when there is an impending tropical system, in which case an owner(s) shall be given twenty-four (24) hours from the date and time of the posting of the notice on the floating structure to remove the floating structure. Such notice shall be substantially in the following form:

NOTICE OF ILLEGALLY ANCHORED OR MOORED FLOATING STRUCTURE

Flagler County Ordinance No. 2023-x prohibits the anchoring, mooring, tying off, or otherwise affixing of floating structures except when lawfully moored in a permitted public mooring field or permitted private mooring, or as otherwise permitted under the Ordinance. This floating structure is currently in violation of the Ordinance and is subject to enforcement under the Ordinance. You are hereby notified that you must remove the above-described floating structure by no later than _____, failing to do so will result in the floating structure being removed or destroyed and you will be responsible for expenses including but not limited to all costs of removal, storage, disposal, and fines, and administrative costs as applicable.

- b. The notice shall also be mailed by First-Class mail to the owner(s) of the floating structure, if known. Evidence that an attempt has been made to mail such notice, if the owner(s) is known, together with proof of posting, shall be sufficient to show that the notice requirements of this part have been met, without regard to whether or not the alleged violator actually received such notice.

(7) If a person fails to pay the civil penalty or request a hearing, fails to appear in court to contest the citation when a hearing has been requested, or fails to appear in court as may be required, the court may enter judgment for an amount not to exceed \$500.00 per infraction and/or may issue a rule to show cause upon the request of the County. The court rule to show cause shall require such person to appear before the court to explain why action on the citation has not been taken. If any person who is issued such rule to show cause fails to appear in response to the court's directive, the person may be held in contempt of court. At any hearing pursuant to this section, the commission of a violation must be proved by a preponderance of the evidence.

(8) Any court of competent jurisdiction, administrative hearing officer, magistrate,

and the code enforcement boards and special magistrates of each municipality within the county, are authorized to impose against violators of this section any costs associated with the dismantlement, removal, impoundment, or storage of any floating structure held in violation of this section.

(9) All owners, part owners, joint owners, tenant-in-common, tenants in partnership, joint tenants, tenants by the entirety, lessees, sub-lessees, assignees, sub-assignees, and holders of legal or beneficial title to or interest in a floating structure that is in violation of this section, shall be jointly-and-severally liable with respect to any legal or equitable judgment or relief obtained in enforcing this section.

(10) All civil penalties shall be paid to the County and processed by the Clerk of Court as provided by law.

(11) It being that Flagler County, the State of Florida, federal or state enforcement agencies, and municipalities within the county possess discretion to enforce this section, such local governments' or state or federal enforcement agencies' delay or failure to enforce any provision contained in this section, however long continued, shall not be deemed a waiver or estoppel of the right for the local government or state or federal enforcement agency to enforce this section at any time thereafter.

(12) The County is authorized to contract with one or more marine salvage companies to assist with the expeditious covering, dismantlement or removal of floating structures held in violation of this section. The County is authorized to cover, dismantle, or remove such offending floating structures pursuant to said contract.

(13) Any person who willfully refuses to sign and accept a citation issued by an enforcement agent shall be guilty of a misdemeanor of the second degree, punishable as provided in section 775.082 or 775.083, Florida Statutes.

SECTION 3. CODIFICATION AND SCRIVENER'S ERRORS

- A. The provisions of this Ordinance shall be included and incorporated into the Code of Ordinances of Flagler County, Florida, as additions and amendments thereto, and shall be appropriately renumbered or re-lettered to conform to the uniform numbering system of the Code. Scrivener's errors may be corrected as deemed necessary.
- B. Only Section 2 herein shall be codified within the Flagler County Code of Ordinances. Sections not specifically amended herein shall remain unchanged by this Ordinance.

SECTION 4. SEVERABILITY

If any section, sentence, clause, or phrase of this Ordinance is held to be invalid or unconstitutional by any Court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

SECTION 5. EFFECTIVE DATE

This Ordinance shall take effect upon filing with the Secretary of State as provided in Section 125.66, Florida Statutes.

SIGNATURE PAGE TO FOLLOW

PASSED AND ADOPTED BY THE FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS, THIS _____ DAY OF SEPTEMBER 2023.

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS

ATTEST:

Gregory L. Hansen, Chair

Tom Bexley, Clerk of the Circuit Court and Comptroller

APPROVED AS TO FORM:

Albert J. Hadeed, County Attorney