

Insights

Cleaning Up After the Storms

Article

Lowndes

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Building and Development Permits

While Florida was bracing for the impact of Tropical Depression Nine, Governor Ron DeSantis issued Executive Order No. 22-218 declaring a state of emergency for 24 counties. As the storm intensified into a tropical storm and subsequently into Hurricane Ian, he amended that order with Executive Order 22-219 declaring a state of emergency for all 67 of Florida's counties.

Due to the potential for impact on building development, all declarations of a state of emergency have the effect of, among other things, extending the expiration dates of many types of building and development permits issued from state and local jurisdictions.

The state of emergency declaration issued for Hurricane Ian, unless extended, is set to expire on November 22, 2022.

Section 252.363, Florida Statutes provides, in part, that permits and other authorizations are extended for the length of the state of emergency and for an additional six months thereafter. The extension applies to the expiration date of a development order, building permits, permits issued by the FDEP or the Water Management District, and the buildout date of a development of regional impact (DRI), including any extension of a buildout date that was previously granted.

Extensions of permits are not automatic. If you choose to exercise your right to extend your permit's expiration date, you must properly notify the relevant permitting authority of your intent to exercise the extension within 90 days of the termination of the emergency declaration, which would be February 20, 2023. The requirement to act on a permit (or permits) is then extended six (6) months past the existing permit expiration date plus the length of time that the emergency order is in effect, which in this case is sixty (60) days (unless otherwise extended).

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Who Is Liable For Clean-Up?

In the aftermath of Hurricane Ian, home and business owners throughout the state are wondering about who is responsible for payment for the repairs and the cleanup when a tree falls on a neighbor's property. In short, the answer depends on whether the owner knew or should have known that the tree was in a poor condition before it fell.

If a tree is diseased, rotten, dead, or otherwise poses an obvious hazard to surrounding neighbors, the tree's owner is liable for any damages, repairs, and cleanup resulting from the fallen tree. If the owner had no reason to believe that the tree was likely to fall, however, the repair costs fall to the neighbor who suffered the damages.

Indeed, the tree's owner is only liable if he or she created the condition that caused the tree to fall on the neighbor's property by failing to properly trim or remove a diseased or threatening tree that posed an obvious danger.

Force Majeure Clauses

As business gets back to normal following Hurricane Ian, business owners should keep in mind that contractual obligations (to be performed by them, as well as owed to them by others) could be modified by "force majeure" clauses in their contracts. A force majeure clause (French for "superior force") is a contractual provision that relieves parties from performing their obligations when certain circumstances beyond their control arise, making performance impossible, commercially impracticable, illegal or inadvisable.

The wording of such clauses varies, but generally speaking they provide for delays in performance on account of Acts of God, natural disasters, strikes, labor and material shortages, war, acts of terrorism and other major unanticipated events.

If, because of the hurricane, you are struggling to perform a contractual obligation in a timely manner, or if a party to one of your contracts is having a similar issue, review the force majeure clause of the applicable contract to determine what it covers. How does it impact the deadlines that the parties have established to perform their obligations? Consider issues presented by closure of businesses (not just yours, but also others that you rely on) during and following the hurricane, as well as loss of utilities, recovery/rebuilding activities, and shortages of laborers and materials. If applicable, a force majeure clause should be invoked by written notice meeting the requirements of the contract.

Tax Relief Notices

If there is severe damage to your home or business, it will also be important to pay attention to your property assessment for 2023 (the storm does not impact your 2022 taxes). This valuation is determined as of January 1, 2023, and should take into account any lasting impact from the storm. These assessments will not be known until August 2023, however, so document the damage, including photographs, as of January 1st.

HOA Debris Removal

Cities and counties in Central Florida, with assistance from FEMA, are currently handling debris removal from Hurricane Ian that could take weeks (if not months) to conclude. Contracts are being entered into with haulers for pickup of large debris (tree trunks, root balls, big branches, etc.) that cannot be accommodated by the usual weekly yard waste service that all local governments offer.

FEMA typically requires local governments to obtain written agreements governing pickup of debris in gated communities having private streets before their haulers will enter the community. These agreements contain various covenants and indemnities by the property owners' association that owns the streets, and should be carefully scrutinized before being signed. Some provisions may be capable of negotiation.

The reaction of most owners (as well as their tree cutting contractors) has been to deposit large debris along the street; however, this debris will typically be picked up using "claw" trucks that can cause damage to improvements under debris piles. As such, local governments have requirements for the placement of large debris for pickup.

You should check with your applicable governing jurisdiction, but you will probably find that debris may not be picked up if it is piled on streets or sidewalks, or next to utility poles, fire hydrants, storm drains or mailboxes. Most governments require that debris be placed on the grass inside the edge of the curb of the street, between the curb and any adjoining sidewalk.

If debris is not picked up due to incorrect placement, the hauler may leave it behind and move on to the next community. If that happens, there is no way of knowing how long it will take for them to return (if at all) to pick up debris that gets moved for later pickup.

It is therefore important for owners, developers and property owners' associations to know where debris must be placed for pickup before haulers enter a community. This may require some owners to move their debris piles to permitted locations.