

City of Coral Gables City Commission Meeting
Non-Agenda Item
October 11, 2016
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Jim Cason
Commissioner Pat Keon
Commissioner Vince Lago
Vice Mayor Frank Quesada
Commissioner Jeannett Slesnick

City Staff

City Manager, Cathy Swanson-Rivenbark
City Attorney, Craig E. Leen
City Clerk, Walter J. Foeman
Deputy City Clerk, Billy Urquia

Public Speaker(s)

Non-Agenda Item [a.m.]

City Attorney Leen: So that was my report. And then I asked the City Prosecutor/Deputy City Attorney for two things. First, I wanted to give you a brief update on the polystyrene case, which is something I'm going to speak on. We had a hearing; we had filed a motion to dismiss. Judge Cueto was our Judge on the Circuit Court and in the hearing, and I'll make sure to provide a transcript to all of you, the Judge agreed with the City on the record. He felt that the two statutes, the polystyrene statute and the plastic bag statute that's what the plaintiffs are saying preempt the City's ordinance on polystyrene; he felt that they were Unconstitutional, based on what's called the Non-delegation of Powers Doctrine, which says that the Legislature just cannot delegate its power to an administrative agency; and as you recall in the polystyrene ordinance, for example, pardon me, the polystyrene statute what the state did was basically, it say we preempt regulation of polystyrene to the agency, and it didn't provide any guidelines. Well that violates the Non-delegation of Legislative Power Doctrine; and the plastic bag statute has the same deficiency. So the City is arguing that those are Unconstitutional, the Judge agreed. He indicated he agreed on the record. In addition, the Judge seemed to agree with our argument about the Miami-Dade

Home Rule Amendment, and also seem to agree, he also indicated that you cannot bring what is called an as applied challenge against an ordinance, which is what the plaintiffs were doing, unless the ordinance has actually been applied. And then, what happens is, the plaintiff by application, what I mean is, so we would cite the plaintiff, for example for, let's say hypothetically one of the plaintiffs or the plaintiff is the Florida Retailers Federation, and then there is also a company that represents 7/11. So let's say hypothetically one of the Florida Retailers Federation members were cited, they can then challenge the ordinance in the sense that they can file an administrative appeal, they can then file an appeal in the Circuit Court Appellate Division, and they can challenge the application of the ordinance to them, but until the ordinance is applied there is no as applied challenge that's allowed based on Florida Law. The Judge agreed with us on that. So what the plaintiffs said then was, well then what we are doing is we are making a facial challenge to the entire ordinance; And so what the Judge did was, he denied our motion to dismiss without prejudice, which means he didn't rule on the merits, we can make all the arguments again. He requested that there be, that the City file a motion for summary judgement, which we are going to go forward and do; we are going to file a motion for summary judgement. We are going to challenge again the Constitutionality of those two statutes, based on the Non-delegation of Legislative Powers Doctrine and other arguments as well, and then we are going to raise our other arguments that we made in our motion to dismiss to also support the City's position, and we could make some additional arguments also. So, I just wanted you to know that it was a very positive hearing for our polystyrene regulations and I just want to make you aware of it.

Mayor Cason: When were they supposed to go into effect?- was it January?

City Attorney Leen: Yes. The other issue is there is a timetable in the ordinance and the City, I want to be very clear, has not stayed enforcement of the ordinance, pending the lawsuit. We believe the ordinance is Constitutional, we believe that its valid, we are going forward with enforcement. We are doing it per the timetable though, so right now we are in the period for warnings. So the City can issue warnings to anyone in violation as they come up; and then starting January 1st the City can cite based on, can actually issue citations, and there are different penalties based on how many times you violate the ordinance within a certain period; and I want to be very clear, the City has not even considered the lawsuit and how it is enforcing the statute, neither positively or negatively toward any of the parties that have sued. We have treated that neutrally, we are not even looking at that. What I've told Code Enforcement is go forward and continue to enforce the ordinance as if the lawsuit had never been filed, just proceed. Obviously if the Judge gives us an order, we would comply with any judicial order, we have the right to appeal, if the order, for example, tried to restrict our ability to enforce the polystyrene regulations, we would exercise those rights, if we had a basis to appeal, but all that's in the future. As of this time, there has been no finding that our ordinance is invalid or

Unconstitutional, and in fact, based on the hearing, the Judge has indicated that he believes that the two statutes that are being proffered as preempting our ordinance are Unconstitutional. So there would be no impediment to our ordinance.

Mayor Cason: So if the Judge says its Unconstitutional is that likely to occur after January 1st?

City Attorney Leen: That depends. We are going forward to file the motion. I would think that there is a likelihood that that decision based on all the briefing and setting a hearing could come after January 1st, but the important thing for us is not just – even if the court were to find that they were Constitutional, it doesn't mean they preempt our ordinance, because remember we've also argued that its basically the grandfathering clause, which only preempted our ordinance and allowed five others to survive via the Miami-Dade Home Rule Amendment. So there are a lot of arguments we have to enforce our ordinance. So in my view, my legal opinion is that we should continue to proceed as if the lawsuit was not filed and just proceed in the normal course to enforce to enforce our ordinance.

Commissioner Lago: Mayor if I may. First of all, I want to commend all of you for your hard work. I know it's been an arduous task representing us in reference to this issue. I was caught off guard that anybody would just go against something that's so fundamentally correct, and it's so beneficial for the environment, but that's another story. The real important factor here is that I've spoken to a lot of representatives and City leaders in other communities, the League of Cities, and they are all waiting to see what happens, because this type of preventive measures taken at the State level by the Governor, by other legislators is, in my opinion, I'm not speaking on behalf of the Commission, is what's wrong with politics nowadays. I think that this type of findings from the Judge if it rules in our favor is going to give a voice to other community leaders who are apprehensive in taking these measures and really supporting the environment, and passing these ordinances and these resolutions, which will hopefully guide the future of South Florida, after Judge Cueto's findings or his preliminary findings, correct.

City Attorney Leen: He did not make a finding or a ruling; he just did it on the record his view of the matter.

Commissioner Lago: I want to speak clearly....

City Attorney Leen: He indicated on the record he was prepared to rule, but the plaintiffs and the Attorney General, who is now a party to the case, objected because they wanted a chance to brief this issue, so he decided he wanted to rule on it on summary judgement.

Commissioner Lago: Well depending on his ruling and it looks like he's heading in a direction, which will benefit the City and what we've been supporting. I would like to see that we take our resolution in regards to the plastic bag and move it more toward an ordinance. I'd like to see if I can get some support from my colleagues. I don't know what we should do in reference to a timeframe, should we wait for the Judge to give us his findings or...

City Attorney Leen: My recommendation would be to go ahead and prepare the plastic bag ordinance and maybe present it on First Reading, and then wait, unless there is some emerging matter.

Mayor Cason: I'd say yes that we do like we did on the polystyrene, which is to get the Chamber of Commerce, the BID and others to start discussing among their members, because it will be, especially for Publix there is a lot of ground work in education and consensus building that should start early on, so that we make sure that they understand why we are doing it, and in particular if we get a favorable ruling that will have an impact all over the State.

Commissioner Lago: Again, I agree with you wholeheartedly. It's interesting, because we had a lot of discussions in the past about Tinta Café and I go there once in a while and I think a lot of us do to get coffee, and something that they are very adamant about is that they are very conscience in regard to the environment, they try to use porcelain plates and cups. It's kind of a different atmosphere when you are used to seeing paper plates and just the amount of waste in other industries, but I had a conversation with the owner and it happened to be there was a gentleman sitting right next to me who his industry is bio-degradable food service products, and he gave me his card and he sent me an e-mail, and I think I forwarded it to the Manager and to Matt Anderson and to Jessica, because the technology already exists, we just have to be a little bit more proactive and less lazy and not find the easiest way out.

Mayor Cason: I've been to some events where you can actually eat your fork.

Commissioner Lago: No, no, no, it's true. There is a lot of things – just bio-degradable products that are out there that are already there, we just again, we are setting the example for everyone in South Florida and on a national level, so I commend my colleagues and staff.

City Attorney Leen: So Commissioner what if we proceed as follows: We'll prepare an ordinance and start meeting before we bring it to the Commission even for First Reading, we'll show you a copy as I presume you are going to sponsor it.

Commissioner Lago: I would love to.

City Attorney Leen: And then we will bring it to the Chamber like we did with the plastic bag, pardon me...

Commissioner Lago: Do what the Mayor said. Let's meet with the Chamber, let's engage them, let's engage the business community, let's sit down with Publix and say listen, there are multiple options here, there are multiple options. But I also want to bring some hard facts, hard facts. It's not just about plastic bags are bad. What are the repercussions of having plastic bags and using plastic bags? I bet you a lot of people don't realize that people think that the number one user of oil is not the production or refinery of gas, it's not, it's plastic. So if you want to really be more sustainable then you've got to get away from non-essential goods, a plastic bag is not essential, you can bring your own bag, and they sell them at Publix. You can use paper, which is recyclable. So again, we can go on for hours and I don't want to take up much more of your time, but I think this is a good opportunity to really again be leaders.

City Attorney Leen: So what I'll do is I'll get Matt Anderson involved too, and we'll do what we did last time.

Commissioner Lago: Perfect.

City Attorney Leen: We'll also go to, obviously the Chamber, and this will come to you in the future. I do think that it's probably worthwhile, since we don't have an active ordinance, particularly since the Judge has indicated that he believes that it's Unconstitutional. Obviously, we need to wait till the actual hearing on summary judgement, but if he rules that way I would say go forward and adopt the plastic bag ordinance at that point.

Commissioner Lago: Perfect.

[End: 12:05:02 p.m.]