

City of Coral Gables City Commission Meeting
Agenda Item E-7 and E-8 are related
October 28, 2014
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Jim Cason

Vice Mayor William H. Kerdyk, Jr.

Commissioner Pat Keon

Commissioner Vince Lago

Commissioner Frank Quesada

City Staff

Interim City Manager, Carmen Olazabal

City Attorney, Craig E. Leen

City Clerk, Walter J. Foeman

Deputy City Clerk, Billy Urquia

Assistant Development Services Director, Charles Wu

Public Speaker(s)

Susan Trevarthen, Outside Counsel for the City

[Start: p.m.]

E-7: Zoning Code Amendment. An Ordinance of the City Commission of Coral Gables, Florida providing for text amendments to the City of Coral Gables Official Zoning Code, amending Article 8, “Definitions”, by providing definitions related to medical marijuana uses; amending Article 5 “Development Standards” by providing development standards for medical marijuana uses; affirming that the City will only approve uses that are legal under federal and state law, and providing for repealer provision, severability clause and providing for an effective date.

E-8: City Code Amendment. An Ordinance of the City of Coral Gables, Florida, providing for text amendment to the City of Coral Gables Official Code of Ordinances, amending Chapter 14, “Businesses”, by creating Article V, “Marijuana Sales”, to provide regulations, restrictions and procedures for the

operation of Medical Marijuana Retail Centers, amending Section 38-6, to prohibit the public consumption of marijuana; affirming that the City will only approve uses that are legal under Federal and State Law; and providing for repealer provision, severability clause and providing for an effective date.

Mayor Cason: We are going to do E-7 and E-8, and I think there is a reason these have to be discussed today because we are going to be voting on some of these issues on November 4th.

Interim City Manager Olazabal: E-7 is a Zoning Code Amendment. An Ordinance of the City Commission of Coral Gables, Florida providing for text amendments to the City of Coral Gables Official Zoning Code, amending Article 8, “Definitions”, by providing definitions related to medical marijuana uses; amending Article 5 “Development Standards” by providing development standards for medical marijuana uses; affirming that the City will only approve uses that are legal under federal and state law, and providing for repealer provision, severability clause and providing for an effective date. Item E-8 is City Code Amendment. An Ordinance of the City of Coral Gables, Florida, providing for text amendment to the City of Coral Gables Official Code of Ordinances, amending Chapter 14, “Businesses”, by creating Article V, “Marijuana Sales”, to provide regulations, restrictions and procedures for the operation of Medical Marijuana Retail Centers, amending Section 38-6, to prohibit the public consumption of marijuana; affirming that the City will only approve uses that are legal under Federal and State Law; and providing for repealer provision, severability clause and providing for an effective date.

Ms. Trevarthen: Good afternoon Mayor, Commissioners, Susan Trevarthen, Weiss, Serota, Helfman, 2525 Ponce for the City. We’ve gone through this issue in a workshop and so I’ll give you an abbreviated version of the presentation. Charles Wu has been an important part of preparing these ordinances as has your City Attorney staff and they are also available to answer questions. So Amendment 2, which is being voted on, on November 4th is for the use of medical marijuana for certain medical conditions. It allows the medical use of any kind of marijuana whatsoever in any form for individuals with debilitating diseases. So we are talking about things that will make you high or euphoric versions as well as smoked and different forms of consuming the drug. It allows caregivers to assist patient’s medical use, it’s implemented by the Florida Department of Health and it applies only to Florida Law. It does not importantly, authorize violations of federal law or non-medical use, possession or production of marijuana; and this becomes affective if approved by the voters on November 4th by January 6th and that’s the reason why we are moving forward on the schedule to have these ordinances be coming to Second Reading and implemented prior to January 6th. So how will Amendment 2 work? A patient obtains a physician’s certification of their eligibility for treatment with medical marijuana

due to a debilitating medical condition. That patient or an approved personal caregiver with an identification card may obtain medical marijuana for the patient's use and that marijuana will be obtained from medical marijuana treatment centers. Of importance to this whole debate and understanding how big a potential issue this is, is looking at the definition of debilitating medical condition, which goes beyond the predictable cancer, ALS, other kinds of things that we've heard a lot about that are helped by medical marijuana. There is this final catchall condition that allows your doctor to do basically a medical cause-benefit analysis to see if it would benefit you and if the benefit to you would exceed the detriment than for any condition that could potentially be certified. We have the statute in Florida already, it's often referred to as Charlotte's Web, because it's only for a very specific kind of marijuana which is Charlotte's Web or other brands which are non-euphoric, which do not make the user high. It's low THC and its high in the other components, the CBD. No smoking, it's only a particular kind of oil that's used and a very limited set of qualifying illnesses and primarily it's about controlling seizures. The statute provides for up to five dispensing organizations and calls for rule-making which has been underway, and that rule is currently in challenge, so it remains unclear whether this statutory process for Charlotte's Web will move forward January 1st as anticipated or not. So just recapping the differences, the statute is a much narrower framework for growing, selling, and using medical marijuana, and the statute also is much more limiting in the type of marijuana who may grow it; it prohibits smoking; it has this research study aspect to it and it limits those medical conditions. Now here's how they are similar. In both cases the interaction with federal law is an important issue and one that's really been determinative of this City's approach to this issue. The Federal Control Substances Act continues to prohibit the production, distribution and use of marijuana for medical or recreational purposes and because marijuana is now a scheduled one drug, it's essentially a federal finding and a federal law that there can be no beneficial medical use of this substance. So there is a real quandary or a paradox in terms of where the state law is heading compared to the federal law. This Act and the federal government still have their regulatory and their enforcement role throughout this country regardless of what happens at the state level, and all organizations and states have been involved in this process, you are looking at Florida potentially becoming the 23rd state that will have medical marijuana under the Constitutional Amendment and they already have it under Charlotte's Web. They all point out that everyone involved in this process, the using, the producing, the prescribing, and so forth, is subject to federal law. So what this City has decided to do and we've brought forward based on the input we've received from you at the workshop as well as from your Planning and Zoning Board their review is to affirm your commitment to the enforcement of both state and federal law and to allow only one kind of use associated with medical marijuana. Of course this is an industry that's going to have a wide range of uses that go from the seed, to the growing of the plant, to the processing of the plant, to the manufacture of whether it be the oil for Charlotte's Web or potentially edibles and other kinds of things under the Constitutional Amendment, down to finally having a retail product that is sold to the patient who needs the medicine. We are only

looking at in these ordinances the potential for the retail center, which is that final point of sale to the patient, and only if and after it is permitted under both federal and state law. If that does become true which is not in fact true now, then it would be moving forward as a conditional use that's subject to a two-year renewal that's provided in the land use ordinance before you this afternoon. It also establishes other land use controls, permitting requirements and business regulations in these two ordinances, and these will act to safeguard the City from the potential negative impacts of the use in the event that federal law changes to allow this use. Also, these ordinances prohibit the public consumption of marijuana in any form. So here's some details from the land use requirements, as I said retail only, in the C zoning district, but not in the Central Business District; and we have some spacing requirements as have been discussed by many cities looking at this issue; 500 from residential zoning districts and 1,000 feet, excuse me, from schools, daycare, parks and places of worship or from another medical marijuana retail center. We've come up with a parking standard working with the opinion of your staff, once spaced for 150 square feet of floor plus one for fulltime employee and one for each two part-time employees. The anecdotal evidence from other states who've had these kinds of uses, is they tend to be pretty intense more than your everyday kind of retail use with a lot of staff, so that's why the parking is enhanced; and the procedure as I've said is a conditional use that must be renewed every two years. The business regulations list a list of the features of the business regulations. Again, this is only in the event that federal law changes; there is a city-based medical marijuana permit; the applicant, the owner and the employee will have to produce proof of having level two background screening; there is hours of operations; increased requirements for maintenance; no on-site consumption; no outdoor activities; no live plants; odor mitigation requirements; signage; and queuing and loitering concerns. And finally, the business regulations also address security. Things like the operations plan, the video surveillance, what's the security of the display and the storage of the product, the marijuana itself, as well as the security plan for the cash, because at this point this is an all cash business. An alarm system, working with our police in the review process to implement the principles of (CPTED) Crime Prevention through Environmental Design; onsite security; and finally fees for application and permitting, and these really are just fees; we are not a state that allows cities of its time to engage in just general revenue rising on this use. It would just be the normal kinds of permitting and application fees. So that concludes our prepared presentation. I'm happy to answer any questions.

Mayor Cason: So basically even though we will be voting on the First Reading now, Second Reading sometime in November or December would get us under the wire in terms of grandfathering, if it passes in November, is that correct?- we don't miss the boat?

Ms. Trevathen: The statute is law now no matter what and it will go into effect sometime next year depending on how long the litigation last over the rule-making. The amendment, if

approved by the voters, becomes effective January 6th and we are currently scheduled to be effective prior to that date.

Mayor Cason: And are any other cities gotten this far ahead of the upcoming issue?

Ms. Trevarthen: I have a couple going to Second Reading before November 4th. I have some others that are going to Second Reading before January 6th. There are other cities that either a) have just not chosen to engage with this issue yet or b) have pursued a moratorium in lieu of substantive regulation. So there is a variety of approaches around the state that are being followed.

City Attorney Leen: Mr. Mayor?

Mayor Cason: Yes.

City Attorney Leen: I'd like to make one additional comment. Ultimately this is not a legalization of marijuana dispensaries in the City. I want to make that perfectly clear. It's a protective measure to make sure that if this is legalized that we have measures in place, that could potentially be grandfathered, but there is Section 4 of the Ordinance, which is the only thing I wanted to speak about, which says very clearly that the City Commissioner hereby affirms a policy that the City shall approve only those uses, businesses, and activities which are legal and permitted under state and federal law. No use, business, or activity which is illegal under state or federal law shall be tolerated, supported, or approved within the City. Specifically the City will not allow any medical marijuana retail center or other type of marijuana related business as long as such business or activity is impermissible under state and federal law in the opinion of the City Attorney. So basically, if we do receive a request for a license and what we are talking about here are not people using marijuana because they have a sickness, we are not talking about that. We are talking about is, using our regulatory authority to allow a use which is prohibited by federal law or preempted by federal law, and in order to do that...

Ms. Trevarthen: A land use.

City Attorney Leen: Say again.

Ms. Trevarthen: A land use.

City Attorney Leen: Yes, a land use, not the use of marijuana, the land use of a dispensary, forgive me, and ultimately the City Attorney works for you and that sort of decision would have to require a change in federal or state law, and it's something that the City Attorney should bring

to you and talk about because that's a significant decision for the City. But ultimately the legal decision would have to be made by the City Attorney, so we can't be that an attorney for someone else comes and makes an argument, Oh it should be like this, it would have to be looked at, it would have to be determined by the City Attorney as a legal matter through the issuance of a written opinion, in my view.

Mayor Cason: Do we have any speaker cards?

City Clerk Foeman: No, Mr. Mayor.

Mayor Cason: So we'll close the public hearing portion. Any discussion?

Commissioner Lago: My discussion is pretty simple. As you read the second page of the proposed ordinance, it gives you a detailed outline of the requirements if you were interested in potentially becoming involved in this as a retail center. My question to you is as follows: If you meet all these criteria where are the options to conduct this type of business in the City of Coral Gables?- where are the opportunities?

Commissioner Quesada: It's going to be commercial, outside the CBD...

Commissioner Lago: If you fulfill the criteria set forth in the proposed ordinance, I'd like to know exactly where the locations are, because I'm going to tell you why, because I'm not in favor of this ordinance. I think that I'm leaning toward a moratorium in my opinion and I would like to know if we do vote on this issue obviously on First Reading, and we move in that direction, where are the opportunities?

Mayor Cason: Do you have a map? I think I saw a map somewhere that showed...

Ms. Trevarthen: Yes. There is a map in your backup, which shows that, I believe it was in the backup, its 8th Street on either side of Salzedo.

Mayor Cason: It's like one block or something.

Commissioner Lago: And that's one of the reasons why I have a problem with it.

Vice Mayor Kerdyk: Why?

Commissioner Keon: Why?

Commissioner Lago: Because you are kind of putting it on 8th Street and the residents of North Gables – no one's called me, I haven't received one phone call, obviously this is something that is not in plain sight, this is something that's preliminary discussions, but I imagine that we will be receiving phone calls.

Vice Mayor Kerdyk: The other question is could we implement this after the election date of – and still get it in before the end of the year? The fact is this may or may not pass. At one time I was going to say it was going to pass. If you look at the polls right now, 60 percent is going to be very, very difficult for this to pass. As a matter of fact, all the undecideds would have to break in that favor. So the question is do we even want to implement this right now?– is it a necessity?– what are your cities doing?– are some of them just sitting back and making a decision later on once they see what happens?

Ms. Trevarthen: Through the Chair if I may?

Vice Mayor Kerdyk: Yes.

Ms. Trevarthen: I agree that the more recent polling data shows that the support for this measure is softening and it is possible that on November 4th it will not pass. However, every year for the last four years there have been bills filed in our Florida Legislature to move forward, not just medical, but even recreational marijuana, there is a national trend here, and so I think many of the cities that have started to really focus and study on this issue have the sense that regardless of what happens at the ballot box this November, this is an issue that ultimately cities will need to contend with. Turning to the other question from the Vice Mayor regarding the timing, this is just First Reading, this does not obligate you to adopt on Second Reading and you'll have the benefit of understanding whether the Amendment passed before Second Reading. However, I do think that there is some small advantage in coming to Second Reading and adopting this prior to January 6th. I can go into that in greater detail, we've discussed it before, but basically you are exercising your regulatory power before the Constitution changes.

Mayor Cason: And basically what we are saying and sending a message that should it pass or when it comes back again, it reminds me of the movie Poltergeist when the little girl looks at the TV and says, "they are back", it will come back over and over and over again. Sooner or later we are going to have to send a signal, do we want these for some reason in Coral Gables, and I think this with all those hoops and loops makes it very difficult.

City Attorney Leen: May I say the other concern is that federal law presently Schedule 1, drugs, so it's not allowed, and because of that and Susan has raised this very eloquently, a lot of these businesses are cash businesses, and they can draw crime.

Commissioner Lago: If I can interrupt you there?

City Attorney Leen: Yes.

Commissioner Lago: 99 percent, 100 percent are all cash businesses.

City Attorney Leen: Yes because it's illegal under federal law.

Commissioner Lago: And I saw a special report on this the other day. The issue that they have is how do they transact business with all that money?

Mayor Cason: The banks won't take it.

Commissioner Lago: The banks won't take it. So then they get into a situation where the employees who actually work at these locations are in harm's way.

City Attorney Leen: Exactly.

Commissioner Lago: Not even the people who are coming to buy their prescribed medication, the actual employees are the people who live in the area, are subject to crime.

City Attorney Leen: But that's why I think the nice thing about this ordinance is it puts in place very restrictive regulations that are very well thought out, but also it ties our ordinance to federal law and until federal law changes it is basically a moratorium. You can't do it until federal law changes. Once federal law changes a lot of these issues about it being a cash business will change as well.

Commissioner Lago: When you say federal law; federal law currently turns a blind eye.

City Attorney Leen: Let me make a point here.

Commissioner Lago: If we are going to discuss federal law; currently federal law is illegal...

City Attorney Leen: Let me explain. The Executive Branch through the Department of Justice has determined not to enforce the marijuana laws – they look at 8 categories to determine. We are not basing – the reason why it says in the opinion of the City Attorney is, we are not basing it under the determination of the Attorney General, the President of the United States, we are simply looking at the law as enacted by Congress. It is illegal. A future administration could

change the position of the administration in one second. What is clear though, is that presently it's illegal under federal law, whether the federal government enforces the marijuana laws or not is a matter of discretion, but it's still illegal and as a City government, we also swear to enforce federal law and it is preemptive. So I believe I'm very comfortable saying that we can rely on federal law, we do not have to accept the interpretation of the Executive. They are looking at it from a criminal justice point of view, we are looking at it from a regulatory point of view and the effects of the fact that it's illegal on our City, and that's a justified way to look at it in my view.

Commissioner Keon: Clarify that for me. You are saying that even if we pass this and even if it passes on the ballot on November 4th, we still wouldn't permit this until federal law – is that right?

City Attorney Leen: I'll let Susan respond too, but I want to be perfectly clear. I don't plan unless I receive instructions otherwise from the Commission, we'll have to discuss it, my view of the law is that this is completely preempted by federal law. I do not believe we can allow these in here and follow federal law until federal law changes and that's the opinion I plan to give.

Commissioner Keon: Well then I would be really comfortable with this then, because if someone – if it did pass on November 4th, by the time the regulatory work is done and come January, they start to establish dispensaries for this we would be able to say that until the federal law changes it is against the regulations of our City.

Mayor Cason: Regardless of whether or not they enforce it.

Commissioner Keon: Regardless of whether...

City Attorney Leen: That's correct.

Commissioner Keon: OK.

Ms. Trevarthen: Through the Chair if I may address that. You have one of the most stringent regulations that I'm aware of. The City of Naples has also prohibited and in the event the prohibition fails there is a fallback regulation. There are a couple of other cities looking at prohibition by far the majority are doing a moratorium, which may ultimately lead to a prohibition or may not, and the issue with a moratorium is they will face the decision and the concern whenever those moratoria end of whether they retain the power to act, and it's impossible to know. There is going to be a legislative session next spring, there may be litigation that goes to the courts, there may be by the time they act following their moratoria, those cities may find they no longer have the power to act. That was the rationale behind acting early

because we know that we have the power to act today, but I want to stress to you, you have one of the most stringent; and to the Commissioner's point earlier, Commissioner Lago, we didn't randomly pick out this location. We started from planning principles of the appropriate zoning districts and the appropriate spacing, and did some modifications to make sure that we ended up with some site. An alternative legislative choice of this Commission would be to just do a straight prohibition, that is a little riskier, that's more likely to draw a challenge. So what you have is essentially a straight prohibition based on federal supremacy, which by the way may or may not work, Michigan Supreme Court says it doesn't work in the Michigan's scheme for medical marijuana, but no Florida court has addressed it yet and we are trying that argument, but in the event that argument fails, we have this strict system of regulation. I'm happy to answer any other questions.

City Attorney Leen: Here's what I plan to do. If we get sued because in my opinion this violates federal law, which it clearly violates, I plan to argue that this is completely preemptive. I plan to move it to federal court based on the fact that's it's completely preemptive, and then I plan to litigate this in the federal courts. I just don't see how a federal court can look at state law, pardon me, federal law and not say it's completely preemptive here.

Mayor Cason: Any other discussion? We don't have any speaker cards, so we'll close the public hearing. Do we have a motion on E-7?

Commissioner Keon: I'll make a motion.

Mayor Cason: Commissioner Keon makes the motion. Do we have a second?

Commissioner Quesada: Yes.

Mayor Cason: Commissioner Quesada seconds.

City Clerk

Commissioner Lago: No

Commissioner Quesada: Yes

Commissioner Keon: Yes

Vice Mayor Kerdyk: Yes

Mayor Cason: Yes

(Vote: 4-1)

Mayor Cason: E-8 – motion? Commissioner Quesada makes the motion, Commissioner Keon seconds it.

City Clerk

Commissioner Quesada: Yes

Commissioner Keon: Yes

Vice Mayor Kerdyk: Yes

Commissioner Lago: No

Mayor Cason: Yes

(Vote: 4-1)

Mr. Wu: We'll bring forth the companion resolution for the application fee at Second Reading.

Mayor Cason: Thank you.

[End: 2:11:40 p.m.]