

**City of Coral Gables City Commission Meeting
Agenda Item G-1
February 28, 2017
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
Economic Development Director, Javier Betancourt**

Public Speaker(s)

Rip Holmes

Agenda Items G-1 [12:41:31 p.m.]

Excerpt Minutes for Joint Economic Development Board and Property Advisory Board meeting of February 8, 2017, requesting action for the City Commission to explore the prohibition of smoking in outdoor dining areas located in the public right-of-way.

Mayor Cason: Let's move to G-1. This is a...

City Manager Swanson-Rivenbark: G-1 we'll have Javier come up. In addition to some concerns that were raised by, I believe it was Commissioner Lago, the Economic Development Board and Property Advisory Board also weighed in on the discussion and they wanted us to bring it forward.

City Attorney Leen: Mr. Betancourt, we've done some legal research on this too, which I'll wait till after you've heard the policy aspect of it, but yes, our office also worked on this.

Economic Development Director Betancourt: So, as described in the item heading, the Economic Development Board and Property Advisory Board had held a joint meeting on another topic, but while they were there the issue of smoking in the public right-of-way as part of the outdoor dining experience came up, and both Boards unanimously approved a resolution asking the City Commission to consider or explore the possibility of prohibiting or banning outdoor smoking in the dining areas in the public right-of-way. This is in anticipation of streetscape being completed, we are going to have a lot more outdoor dining and they want to ensure that the experience is a positive one.

Mayor Cason: Just be careful that we define the area, because if somebody walks away from where you are sitting down to eat and you go to the corner of the building can you smoke there?- you see that a lot. So, what is the area in which you cannot smoke presumably outdoor cafes is what we are talking about.

City Attorney Leen: We've looked at four statutes – Section 386.204, Section 386.203, 386.2045, and 386.209 as well some Attorney Generals opinions. What the current state of the law is, is that indoor smoking where it's an enclosed work place is illegal. For outdoor smoking the court, pardon me, the Florida Legislature has adopted regulations saying that cities cannot regulate smoking, i.e. the cities cannot ban smoking outdoors as a general police power measure. Now there may be issues with that preemption statute for the same reasons there have been issues for some of the other ones that is something we should explore. However, my office has looked at this and we believe that in areas where the City is exercising proprietary rights as well, such as streetscape where we are, for example, we've just done this tremendous restoration of the sidewalk that's in progress right now and when this comes back you are going to have very comprehensive rules relating to how businesses can get, restaurants can get outdoor seating. So, the City Manager raised the idea, which we looked at and I believe is legal, we make a challenge, but I believe we can defend it and I feel strongly about it that we can defend it, is that as a condition that a restaurant wanting outdoor seating would accept, basically be a condition of the outdoor dining permit, outdoor seating permit, they would agree not to allow smoking in their proprietary capacity, so we would essentially be making that a condition of approval, and the reason why I believe we can do that is because I believe that the right-of-way, particularly when we have exercised such governmental authority by essentially redoing the whole road and putting a tremendous amount of funds into it in order to make it as beautiful as possible that we have significant authority to control what happens there, particularly since no one has a right to have outdoor dining, that's a privilege that you would request through a process that we have. And remember, smoking isn't just the smoking, it's also the smell of the smoke, sitting there and

being irritated or affected or sometimes some people have a reaction, an actual health reaction to the smoke, so it's going to – and the idea behind this, and the Commission would need to make the appropriate findings is that it will decrease the enjoyment of the dining experience, and assuming that's all true and you make those findings, seems to me that we could, we have a colorable and I believe we have a good basis to adopt such a requirement and then we may have to defend it. We just have to be aware that it could be challenged, but we've been successful so far in those issues.

Mayor Cason: So, what do you require? - you come back with a resolution, an ordinance or what?

City Attorney Leen: Well some other cities have done resolutions urging the state to give more, I believe to cities to regulate, that's something we may want to do as well and we can come back to you, but what I'm talking about is the provision related to outdoor dining that we may want to include a condition that simply says that you can't have smoking if you are going to get an outdoor dining permit, and in my view that's within the City's power and does not run a fowl of the statute, because it is not a general regulation of business, it's something that's a privilege that the business is requesting on our right-of-way, the City's right-of-way, which it controls and as a property owner it should be able to provide requirements, same as with Venetian Pool, even more so than Venetian Pool, because that's something that we actually exercise in our proprietary capacity, but I believe with the right-of-way as well, because the whole idea of the right-of-way is that we are allowing this outdoor dining and its benefiting the businesses of Coral Gables and the City. So, I feel comfortable with both.

Mayor Cason: So, what do you need from us? Do you need us to say yes, go ahead, is it going to be administrative?

City Attorney Leen: Yes, but we just realize that there could be – first we wanted your guidance, that's more from the policy makers, we want your guidance, from a legal perspective I want you to know there is a risk if we do it, but that I believe we could defend it, and I think we've got a good argument to do so.

Commissioner Keon: Javier just one question. Is all outdoor dining whether it's on the restaurant's premises, because some areas have an area that is outside of their restaurant that is a patio-type area where it's on their premises they have outdoor dining, as opposed to like in the public right-of-way to allow outdoor dining, so could we effect that on – I mean I know that you are saying we could effect it, because it is on the public right-of-way. What about for restaurants that have their own outdoor dining space that is within their property?

City Attorney Leen: A business can do that. I don't feel as comfortable there, because I do feel that that's more like a regulation, a business where we are not granting them something that they don't have to seek.

Commissioner Keon: So, it's only where we are...

Mayor Cason: Public right-of-way.

Commissioner Keon: ...the public right-of-way.

Mayor Cason: So, it's not on his second floor outdoor dining facility.

City Attorney Leen: Let me be clear, it's not the public right-of-way where you are just walking, people can still walk down the street and smoke, I mean the sidewalk. What it's saying is in the dining area where we are exercising a higher degree of control and we are granting a privilege or a license to be able to use that area for outdoor dining that's where I think we have the best argument that we can do this. I also should tell you, there is an Attorney General Opinion relating to parks, which the Attorney General at that time, was that Charlie Crist?- pardon me Pam Bonde, opined in July 2011 that she felt that that particular jurisdiction could not regulate smoking in parks. I don't with this Attorney General opinion, it's not binding on the City, but you should be aware of it. We may be challenged, but we have a good argument and we could show it's a very narrow thing that we are doing to address a specific concern within the City's police power, and that we will be respectful of the statute and try to basically enact an ordinance that does not run a fowl with it. We also could challenge the statute that's another thing we could do.

Mayor Cason: But this is very narrowly written; this is outdoor dining areas in a public right-of-way, that's it, yes that's it.

Economic Development Director Betancourt: I would add Mr. Mayor maybe a suggestion, we have not had this conversation with the business community, with the B.I.D., with the Chamber or with individual merchants, so perhaps as a first step we can direct the administration to have these conversations to further explore the issue.

Mayor Cason: Yes, I don't have a problem with that, but personally when it comes back if I'm still here I'm going to vote to ban it, because I think that it's an imposition on people sitting outdoors eating your whatever you are eating and have smoke from cigars or whatever else in your face. I think it's a health hazard and I think we should do it and take any challenges that come our way. So, what do you all want to do, bring it back?

Commissioner Keon: Yes, I would support it, but I think you should speak with the businesses, with the Chamber, and with...

City Attorney Leen: There is one thing. We have an ordinance that's coming back where we would include it, which is the different conditions upon which an outdoor seating permit is granted, so we would add a line. We obviously can raise that with the B.I.D. and talk to them about it.

Mayor Cason: And that would be an ordinance, right?

City Attorney Leen: That is an ordinance on Second Reading when it comes back.

Mayor Cason: OK. When it comes back then we can have any more public comment on it, but I think let's see what the B.I.D. and the Chamber come up with and then we can have the public input and see what we are going to do.

Commissioner Slesnick: This is only for restaurants in the B.I.D. area or other restaurants around the rest of Coral Gables like on Ponce?

City Attorney Leen: That particular ordinance relates to those specific areas around the streetscape.

Commissioner Slesnick: Giralda and Miracle.

City Attorney Leen: So, if you wanted that to apply to all outdoor dining in the City on public right-of-way where a permit is being requested then we can do a separate ordinance.

Mayor Cason: I think it should be on any outdoor dining, because what's the rationale for the B.I.D. property and the rest – the reasons against smoking in the dining area are going to be the same anywhere.

City Attorney Leen: Yes. I think we can defend both on the same grounds. I think the argument for streetscape is stronger, slightly stronger, because we've just created this area that we want. We have a proprietary interest in that doing well, that's our property, we are given custody and control of it, we want the businesses to do well that's good for Coral Gables. We could include those parts, but you know what, that's true for the whole City to a large extent. So, I think that we could defend it either way, but it would be slightly stronger, I think for the streetscape areas.

Mayor Cason: Alright, so – come up, it's not an agenda item it's not a public hearing.

Mr. Holmes: OK. I apologize. I thought it was...

City Attorney Leen: It's on the agenda; it's not a public hearing item.

Mr. Holmes: I happen to agree with the ordinance. I think that second hand smoke, I even know someone who got lung cancer who had never smoked, because of second hand smoke, my mother-in-law. I agree with the ordinance, but I beg you not to use this other easement thing as a basis for it, because if you think about it from someone on my road, they say, I don't want these pavers, this is my property.

Vice Mayor Quesada: You have a highly inaccurate interpretation of the easement issue, so I would suggest that you take your time, you review it, you think about it....

Mr. Holmes: Well I asked for a meeting with you and you never gave it to me...

Mayor Cason: I think you are on record as supporting the ordinance, a future ordinance about smoking.

City Attorney Leen: But Mr. Holmes we are not talking about putting it in the easement ordinance. We are talking about, which I wouldn't even call it an easement ordinance.

Mr. Holmes: But I think you cited the easement...as a basis for doing...

City Attorney Leen: No Mr. Holmes I'm not, OK, I didn't.

Mayor Cason: You did mention the word easement.

City Attorney Leen:....correctly what I said. What I said was, we have this other ordinance, it's the one related to the two streetscape areas related to signage, the one that was done earlier today that passed on First Reading and is coming back on Second Reading, that's the one I'm talking about including it, not the ordinance. What's going to happen with you and we've already talked with the B.I.D. You are going to get a letter attaching the ordinance explaining what the ordinance does and you are also going to get phone numbers of Peter Iglesias and Cristina Suarez who are going to be able to explain to you whatever you need. I believe in the end you will find that this ordinance benefits you, because you've already filled out the covenant, but you know what, that's for you to judge. So, we'll send you the letter and we'll see what you have to say.

Mr. Holmes: First of all, I apologize I thought this was a matter of right of people participating, so I thank you for the privilege. Since you brought it up though, I really believe doesn't the Coral Gables City Commission have a tradition of deliberately avoiding eminent domain, of deliberately avoiding easements. I think this is a very slippery slope. I urge you all not to go down that slope.

Commissioner Keon: Mr. Holmes, I think that if you would meet with Peter Iglesias he would walk on the Mile with you and actually show you exactly what we are talking about, so it's not just a written document, but it is. Give him that opportunity and if you still have a problem we would be glad to meet with you, but give him the opportunity to actually show you what we are talking about, so you don't only have the opportunity to read it, but you have the opportunity to see it, and at that time if you are not satisfied then we can continue to talk, but before you spend any more time just have that opportunity. Thank you.

Mr. Holmes: I have signed the covenant that he gave me. I don't know whether this new ordinance goes beyond the covenant, so that's my concern. Secondly, I also believe in property rights, now you all are such successful people, I envy you, you don't have to worry about your own personal property rights, but one day or sometime you probably will and I don't think that this Commission has a tradition of taking away people's property rights.

Mayor Cason: Item G-1 that we are discussing is the public right-of-way, the public right-of-way, so thank you, thank you.

Commissioner Keon: Let him show you, let him show you.

Mayor Cason: OK. So, we are going to then have staff work on this and come back to us on G-1.

[End: 12:56:00 p.m.]