

City of Coral Gables City Commission Meeting
Agenda Item I-1
March 11, 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

City Manager, Patrick Salerno

City Attorney, Craig E. Leen

City Clerk, Walter J. Foeman

Deputy City Clerk, Billy Urquia

Historic Preservation Officer, Dona Spain

Public Speaker(s)

I-1 [Start: 11:34:52 a.m.]

Discussion of Interpretation Re: Calculation of Development Rights for a Sending Site.

Mayor Cason: OK – City Attorney.

City Attorney Leen: Thank you Mr. Mayor and Dona could you come up too? At the last meeting the issue came up regarding the Transfer Development Rights and what are the amount of the development rights that a donor site is able to receive and this issue has been, this issue was raised by the Vice Mayor and I agreed to take a look at the history of this subject and to come back with you with a report. I do have a folder Mr. Vice Mayor, which I'm going to provide to you so you can take a look at all the history on the matter. I'm going to give you a brief description of it. What I found is that – well first, let me tell you again what my opinion was. I issued a City Attorney interpretation, I received a request from City staff and outside counsel and I took a look at it independently and I gave the interpretation and my view was that the figure that should be used is 3.5, and I think all of you have received a copy of that

interpretation with the agenda, and my reasoning behind that was just basic statutory interpretation, interpretation of an ordinance. I was looking at the plain wording of the ordinance and in my view I talked about the maximum floor area permitted on the property by the applicable zoning district and the maximum gross floor area permitted in that site zoning designation; and in my view the maximum possible – I did that sort of a hypothetical question, what's the maximum amount that's possible there?- and in order to calculate that it was my view that you had to both calculate what could be done as a matter of right and also what could be done with Mediterranean design bonuses. Otherwise you are penalizing, in my view, those properties. Because obviously as a historic property unless it's a very extraordinary circumstance where demolition is allowed or something like that, they are not going to be allowed to develop anything there beyond what's – obviously there is always things that can be developed, but you are going to have the historic structure, so they are not going to be able to develop what they could as a matter of right. They are also not going to be able to take advantage of the Mediterranean bonus program. So the idea is to promote historic preservation and that's part of the reason for the transfer development rights, and also the idea was not to penalize these properties because they are being found to be historic properties. So they'll receive the ability to transfer whatever rights they could have under the Code. Now the Vice Mayor correctly raised the issue that this issue has been talked about in the past, so let me just give you a brief history of that. The issue came up quite a bit in the late 1990's, early 2000's, and that's what you recall Mr. Vice Mayor, it came up with La Palma Hotel, it came up with some other properties as well. I have a chart for each of you. At the time it came up with La Palma there was a different set of opinions between staff. The head of Zoning basically took the position that it should be 3.0, the Historic Preservation Officer took the view it should be 3.5. What ended up being applied by Zoning based on the Zoning Director's view, which is the one that ultimately prevailed was 3.0 was applied to a number of properties. I looked, I had my staff look, I asked Dona to look to see if there was a resolution of the Commission deciding the issue of 3.0 versus 3.5 or what it is was basically a staff interpretation that was reported to the Commission and approved, and I did not find, Mr. Vice Mayor, any resolution or ordinance approving 3.0 or 3.5. I did find – there was an understanding though among staff because of the Zoning Director's decision that it would be 3.0 and you did raise the issue and it's in this folder, so you can take a look at it, in 2011. It came up when there was an amendment to the transfer of development rights ordinance in the Zoning Code, and initially when Eric Riel presented – and those amendments did not change any of the substance of the TDR (Transfer Development Rights) rights. In fact he specifically said into the record it was not changing the content, it was basically making a few clarifications in the TDR ordinance. The only change was the addition of a two-year time limitation for the issuance of the certificate of TDR's and some wording changing. However, it came up during the discussion, Eric said that the amount – the number that was used in calculating how many TDR's was available was 3.5, and the Vice Mayor at that point in the minutes said, well he thought it was 3.0, and he wanted Eric to look into that and get back. Eric came back on Second Reading and

said that staff's interpretation had been 3.0, so he was mistaken regarding the 3.5. Now what I perceived occurred here was, you did have a difference of view among different staff members at one point in time, I don't believe it ever was conclusively decided by the Commission. The way it came to me was, I was asked – there was an ordinance that was passed after this discussion, which gives the City Attorney the authority to interpret the City Code, the Zoning Code, the City Charter, it's come up recently in another meeting as well. I use that ordinance, when I took a look at it, to look at the language of the Zoning Code and give my best interpretation, I stand by it, I think it's the correct one. I'm going to tell you though what I plan to do in the future to make sure this issue doesn't come up again. You know the issue of maybe there is prior interpretations, I have a plan for that, but I wanted to let Dona speak briefly about it too and then Mr. Vice Mayor if you had any questions or you wanted to talk about it; and then I wanted to talk about what the effect of the interpretation is going forward.

Mrs. Spain: I've always felt 3.5 should be used. Dennis Smith when he did his determination said 3.0, but really it's for the historic properties. My view, the TDR's (Transfer Development Rights) are not necessarily for the developer, they are to protect the historic properties and give them the ability to maintain them. So now that this interpretation has been used I think that it's important that those properties that had transferred the 3.0, should have the ability to go 3.5.

Vice Mayor Kerdyk: Let me just start off here. I'm not debating the legalities of this at all, whether its 3.0 or 3.5 there was a rationale why we picked 3.0 at that point. My issue is that, that was a Commission legislative decision at that point and some day you're going to make some legislative decisions. I don't want the City Attorney or anybody interpreting that without telling us, hey you know what, I know it was 3.0, whether it's a resolution or not, you read it in that, we've always given 3.0, there must have been some direction – I actually think it went to the Zoning Board, I have not applied the time to go back and look and counter your thought process there. My thing is trying to correct a wrong here, because personally I don't think you should be interpreting what the Commission has to do up here, if you want changes its good and I don't have a problem with 3.5 FAR, I promise you, I don't have a problem with it whatsoever. I was just sort of miffed after we had such long discussions about the 3.0. I'm just saying it like nonchalantly say, Oh 3.0 when they were presenting and the presenter said, no we are using 3.5 FAR, OK, but who had the right to change that from 3.0 to 3.5 without telling this legislative body, I mean a legislative body is the overriding body of this City.

Commissioner Quesada: Well hold on a second, did I miss something?- it was never voted on in the previous...

Vice Mayor Kerdyk: I sort of remember a resolution being – but it was certainly interpreted that way Frank. We gave numerous, numerous TDR's out from different properties...

Commissioner Quesada: But you are saying there was specific discussion whether it was 3.0 or 3.5.

Vice Mayor Kerdyk: I'm sure he showed a specific discussion, specifically about it and actually think it went to the Zoning Board too with a recommendation that's why the Zoning Board came here with a 3.0 FAR.

Mrs. Spain: I wasn't in Historic Preservation then, I was in Zoning and my recollection is that that Ellen Uguccione in her staff report recommended to the Planning Department that it should be 3.5, and I believe it did go to the Planning Department...

Vice Mayor Kerdyk: It did.

Mrs. Spain:...and they said 3.0.

City Attorney Leen: I have it here in this folder. It went to the Planning Board and also went to Historic Preservation Board. The way it was reported to me in here was that they decided not to take action on it. The issue was though – and so it never came to the Commission is my understanding for determination...

Mrs. Spain: I don't remember it coming to the Commission....

City Attorney Leen:...Mr. Vice Mayor, I did have more to say about it. I didn't want to say to you that the way I viewed it was look, I wasn't informed about this history. Obviously I need to do something in the future to make sure I know about the history. I rely on staff to let me know if there is an interpretation, my own obligation to do that as well. I'm going to talk to staff about it, we are aware of the situation. The primary issue is probably that Eric is not here anymore. He had the history on this issue, so I was just not alerted to that fact. I don't disagree with you, obviously I feel that the Commission is the governing body, if the Commission is given an interpretation I would generally follow it. If I'm going to change it under some ordinance authority you've given me, I would inform you and then of course you could direct me otherwise.

Vice Mayor Kerdyk: Or in this mechanism you should have probably come to us and said listen, I think we should have 3.5, is that OK with you?- and then let's apply it to these new applicants, that's OK, we probably go for the 3.5. What I'm concerned about – OK, this is past, I just don't want to have it again on some other interpretation that the City Commission may make on a different item, and I don't know how the mechanism is for that. I don't know with a turnover that

we've seen over the last several years here, not only on the dais, but throughout City Hall that we really have that historical knowledge. There has got to be a process through, I guess the City Clerk's office where you are able to hit TDR's, Transfer Development Rights and everything pops up and then you are able – but this one you would have known because you would have looked back at the historical granting of these TDR's and you would have found that it was 3.0, and I'm going to make an interpretation that's different...

Mayor Cason: Do you want to make a resolution now to make it 3.5?

Vice Mayor Kerdyk: I don't have a problem with 3.5 at all; I already debated that a long time ago...

Commissioner Lago: I think Dona brought this up last time. If we were granting that the multiplier was 3.0 and now we are moving in the direction of 3.5, what's going to happen with the difference of the properties...

Mrs. Spain: The ones that have transferred...

Commissioner Lago: The TDR's...

City Attorney Leen: I did have something to say about that.

Commissioner Lago: You think about it you have to, in my opinion I think you have to go back retroactively and alleviate that...

Mrs. Spain: They would have the ability to sell, my view they would have the ability to sell...

City Attorney Leen: I don't think you have to be retroactive, you don't have to go back and reconsider these votes, they have the additional rights. So it just applies going forward, but they would now have these additional rights to sell. I did want to say – look ultimately, I've given about over 100 interpretations and many more informed, so my concern is, I have two concerns. One, I want to be available to staff to give these interpretations on a day-to-day basis, because I think it's good when they let me know and I let you know when I find if there is a big issue I let you know and it gives me the ability to work for you and to make sure that your will is accomplished. So I want to be able to do that and not delay those opinions every time. On the other hand, obviously I want to follow your will and it appears that at least in this case that didn't happen. I don't want to blame staff; ultimately I gave the interpretation so I take responsibility for it.

Mrs. Spain: Its staff's responsibility to give you the entire history.

City Attorney Leen: I take responsibility.

Mrs. Spain: If you ask – I'm asking for a legal opinion it's my responsibility to give you everything there is to know about that.

City Attorney Leen: I take responsibility; I will ask in the future, I apologize. I do think that this is what the interpretation should be though, based on my reading.

Vice Mayor Kerdyk: The reason that we went with the 3.0 just to let you know was the fact was we want to be a little bit more conservative and not throw too many TDR's out there, and we wanted to see what this program was going to be about and maybe now that we've had 10 or 12 years we understand that it was not, it's not going to change the dynamics too much in the downtown area, but at that point we didn't know. Listen, I mentioned to you about the Coral Gables Elementary School, when you throw .05 more in there they are going to get like unbelievable amount of extra TDR's. So we wanted to be conservative and it was the right decision at the right time, and I do remember that Historic Preservation took one stance and Zoning took another stance, and I guess it was extensively discussed and there was a rationale for our decision; and again, I am not so concerned with that, I just don't want it happening in another instance, whether it's six months from now or 15 years from now from an interpretation. I think the City Commission ultimately should do it, I think the methodology should have been different. You should have come to the City Commission and said listen, we recommend that we increase it from 3.0 to 3.5 instead of just going with your decision or your interpretation of it, that's really where it gets to me, where you just interpret it or misinterpret it or over interpret it what the City Commission had agreed upon earlier, that it....

City Attorney Leen: I understand Mr. Vice Mayor.

Mayor Cason: Do you want to do a resolution?

Vice Mayor Kerdyk: I'm fine with the 3.5.

City Attorney Leen: If I may, I'd like to...

Commissioner Keon: But I think that it is important.

City Attorney Leen: I'd like to rectify that though, I would like to – I think that you should make it 3.5 based on the wording of the Zoning Code, I think that it should apply going forward the

properties, I think it would be useful for you to pass a resolution supporting my interpretation and then there would be no issue any more about this.

Vice Mayor Kerdyk: But how do we stop the process issue?- it's a process issue that's the issue.

Commissioner Quesada: I understand. Procedurally how do we ensure this never happens again?

Vice Mayor Kerdyk: Yes, that's the question.

Commissioner Quesada: And I think really the answer to that is getting the City Clerk involved in issues that get brought before this Commission. For example, on that issue if there is any potential discussing TDR's, maybe the City Clerk has to pull the historical discussions related to TDR's and any major votes that this Board has taken.

Commissioner Lago: And also a list of sites that have been granted TDR's or TDR's have been removed.

Commissioner Quesada: Specifically the TDR issue, but if the issue is dog parks, just to pick a random thing out of the sky, any conversations that we've had related to dog parks. It was similar when we were discussing the trolley a few meetings ago, you know when we asked the City Clerk to pull all the historical meetings and analysis that had been done, maybe that needs to be done proactively rather than waiting for the Commission to request it just to ensure that the interpretation is correct.

Mayor Cason: Walter how far back can you go to provide...?

Mrs. Spain: 1925.

(Laughter)

Mrs. Spain: It's the most amazing thing; you can type in TDR and you have everything that was discussed.

Vice Mayor Kerdyk: You would have had everything.

Mayor Cason: Is that correct.

City Clerk Foeman: 1925.

Mayor Cason: OK.

City Attorney Leen: What I'd like to do is if I'm giving an interpretation that is material, this is a material interpretation obviously change the number it affects the property. So in the future if it's material, I need to be able to give day-to-day interpretations, but if it's something material and you'll have to trust my judgment and if I make a mistake, then it will come up again and we'll talk about it and perhaps you could put more requirements in, but for now what I would like to do is if it's a material one, I'd like staff to look when they are asking for an interpretation to see if there is any history, I'll look myself on an important interpretation and I'll send the interpretation to the City Clerk to see if there is anything that he knows of and this would be a quick process, because we still need to get the interpretations out, but on a material one let me use my discretion, but I will make sure to check if I think that there is some issue and then hopefully it will never happen again. I have issued over 100 and this is the first time, so I'm sorry.

Mayor Cason: You have anything else you want to say?

Mrs. Spain: I'm good.

Mayor Cason: What about the issue of retroactive, what do we want to do on this?

Commissioner Quesada: Again, his interpretation was not retroactive they are still there. I'm going to make a motion – motion or maybe legislative interpretation of what it means of 3.5. I'm of the opinion that when I look at some of this list, the historically designated properties within the CBD, some of these buildings need some – there are groups that ask us for money, there is one in particular that jumps out there at me and when I see the fact that they have, for example, the Miracle Theater has 41,000 available square feet, that could be very valuable for them to....

Commissioner Keon: But they don't own it, we own it.

Commissioner Quesada: I'm sorry, I'm sorry, you're right, correct, correct, you are correct, but my interpretation would be that you said that they still have those available amounts outstanding.

Mayor Cason: That's what I meant by retroactive, they are still there it's a credit that they can use.

Commissioner Quesada: Correct.

City Attorney Leen: The way I would interpret what you are saying is that the prior vote stand, those votes are – those were correct when they were done, but we are giving a new interpretation today and because of that going forward properties that only have 3.0 before now have the 3.5 like anyone else, because that's the interpretation, so they still have available FAR to be able to transfer.

Mayor Cason: You have a problem with that?

Vice Mayor Kerdyk: Say that one more time.

City Attorney Leen: So the interpretation is from this day forward that it's 3.5 or from the date of the interpretation, but its 3.5, so properties that have only used 3.0 would still have .5 available.

Mayor Cason: I think we need to make sure if we pass that, that we notify those people that have an excess, another .5, because otherwise it looks like if they don't follow what's going on here they many never know that they have something.

Vice Mayor Kerdyk: Let me tell you. I think that's a recorded document, I think it's recorded. Dona, the TDR's is that recorded?- how many TDR's they have left?- I've actually have seen one, so I can tell you I know it's true, so that has to be some – if we are going to allow them some more TDR's based on the fact that they were only allocated 3.0, we would have to record that, you know the difference there.

Mayor Cason: Notify them that they have.

Vice Mayor Kerdyk: Well it's recorded, it's in the public records, it's in the public records.

Mrs. Spain: It's recorded that they transfer the 3.0....

Vice Mayor Kerdyk: No, no, no, I saw – listen, I'm doing the George Fink Building and I just saw a record document saying he has 1,168 available, so now he is going to get, that's great he is going to get another 2500 – \$75,000 – \$30-\$35 a square foot is what these things are going for.

Commissioner Lago: I think what Commissioner Quesada said is true, when you think about it there are certain properties on this list that are in dire need of a cash infusion and if they are willing to sell their TDR's and they are going to spend that money on refurbishing the historic building structure, I think it's a win-win for everyone and they probably don't even know about this.

City Attorney Leen: I have the authority – what we can do is we can notify the properties. I have the authority to correct a restrictive covenant with them, so if they want they can ask the City Attorney's office to do a new covenant, the same except that it will increase the FAR.

Vice Mayor Kerdyk: Notify them, yes.

Commissioner Quesada: Just to be 100 percent clear, I think we should vote on this.

Commissioner Keon: I think we should pass a resolution to codify this.

Commissioner Quesada: Agreed – agreed. So that's the motion what we just discussed.

Mayor Cason: OK.

Commissioner Keon: I'll second it.

Commissioner Lago: Is there going to be a mechanism to broadcast this to the individuals or entities that are...?

City Attorney Leen: Well legally you don't. I think the way you should do it is, you should accept the City Attorney's interpretation and apply it, because here's the thing, you can't amend the ordinance by resolution, but I've given an interpretation which you could accept.

Vice Mayor Kerdyk: OK

Commissioner Quesada: OK.

Commissioner Keon: Does it travel with the ordinance then?

City Attorney Leen: Yes, it would travel with the ordinance, it's an interpretation...

Commissioner Quesada: So my motion is to accept the City Attorney's interpretation of the available TDR's and the 3.5 FAR.

Mayor Cason: OK.

Commissioner Keon: I'll second that.

Mayor Cason: So Commissioner Quesada makes the motion...

Commissioner Quesada: But before we go forward, I'd like to hear Vice Mayor any additional thoughts considering you have lived this longer than we have.

Vice Mayor Kerdyk: I'm fine. I just want to make sure the process is taken care of so we don't have something else that is misinterpreted at a later, not misinterpreted but...

Commissioner Keon: Reinterpreted.

City Clerk

Commissioner Keon: Yes

Vice Mayor Kerdyk: Yes

Commissioner Lago: Yes

Commissioner Quesada: Yes

Mayor Cason: Yes

(Vote: 5-0)

[End: 11:56:30 a.m.]