

City of Coral Gables City Commission Meeting
Agenda Item I-1
April 22, 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

Public Speaker(s)

Agenda Item I-1: [Start: 12:34:55 p.m.]

Follow up to Commission inquiry regarding texting while driving laws.

Mayor Cason: So we are back in to pick up Item I, which is a City Attorney Item. Craig, before we go into your views on texting while driving, it reminded me over there looking at the first orchids why we are doing this because they were all stolen in previous years. Could you look into some kind of penalties, stronger penalties for theft of orchids?- because it's still going to be a problem, I think, even if we put them up higher.

Commissioner Quesada: Well you are getting into State Statutes and its really criminal, is there anything we can do in an ordinance?

City Attorney Leen: We have an ordinance right now that prevents people from harvesting trees. It could be more directly worded though and there would be a potential that we could put together an ordinance that would make it a crime, really it's called the Municipal Violation, but punishable for up to 60 days in jail, specifically for removing orchids from a tree. Of course I'd

want to check with state law and federal law to make sure it's consistent, but yes, I can look into that and prepare a proposed ordinance with staff, assuming one is warranted. I believe it is warranted unless state law or federal law shows that it's not permissible.

Mayor Cason: I was talking to the gentleman from Fairchild about Everglades, and he says, now unless you have binocular you can't even see the Everglades. So you know they are gone because they are beautiful and people will have a tendency to take them over the years, and so I think anything we can do as a disincentive, but if you could look into it and get back to us what your recommendations are.

City Attorney Leen: Of course and what I would say to the Police Department is that we do have a provision in our Code though that does prevent the harvesting of fruit, for example, or other things from trees and I would interpret that to apply to an orchid that's been placed there by the City, but I do think it would be much better to have an ordinance that's directly looking at orchids.

Mayor Cason: Alright. You want to talk about texting.

City Attorney Leen: Commissioner Quesada made the request last time that I look into texting while driving, texting while driving ordinances and whether that could potentially be an ordinance of the City Commission. There are three statutes that are related to texting while driving or at least to this question. The first is Section 316.305 of the Florida Statutes. That Statute authorizes law enforcement officers to stop motor vehicles and issue citations as a secondary offence to persons who are texting while driving. It has a definition of what texting while driving is just in a general way what it says is basically if you have to enter multiple letters or numbers into your phone or into your device, your wireless communication device that, that would be texting while driving. There are some exceptions when it's not considered texting while driving under the statute.

Commissioner Quesada: The biggest problem is that it's a secondary offense.

City Attorney Leen: Yes.

Commissioner Quesada: And just to be clear for anyone watching on TV, what that means is, if a police officer sees you texting while you are driving your vehicle they cannot stop you and cite you for that. You have to be either swerving or driving without a seatbelt or speeding or any other type of violation, expired registration, so that's the biggest concern. So my question was can we do anything and make it a – remove it from being a secondary offence within the City of Coral Gables?

City Attorney Leen: So, I looked at (Section) 316.007 of the Florida Statutes, that is a pre-emptive statute. It basically says that, under state law local communities, local cities and counties cannot pass additional laws related to that chapter. It's basically pre-empted by the state and that's because traffic regulations generally the state has said should be uniform in every community. So we looked specifically at – and also there was an Attorney General letter. I checked with the Florida Municipal Attorney's Association and the League of Cities and what they told me was that several cities in 2009 attempted to restrict texting while driving, but then the Attorney General sent a letter basically saying that they couldn't do it because it was pre-empted to the state. Now this statute on texting while driving has also been passed and it does not make any allowance for municipal regulation, so my general view, there is not a case specifically on point based on the statute yet, so we could try, but my general view is that it would be pre-empted by the state.

Commissioner Quesada: It sounds like we'd be challenged and we would lose.

City Attorney Leen: Yes. So that would be my opinion. But what we did look at was something you could do, for example, is you could pass a resolution directing the Police Department to enforce the state law to the full extent that it can be enforced and basically that would mean, it's a secondary offense, but there is a primary offence called careless driving and careless driving basically says that any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner having regard for the width, grade, curves, corners, traffic and all other attending circumstances, so as not to endanger the life, limb or property of any person. So if for example, a police officer sees someone not looking at the road because they are looking down and they do that for more than a couple seconds, at some point there would be probable cause to pull the person over for careless driving.

Commissioner Quesada: Is there case precedent that will support that?

City Attorney Leen: No. The case precedent would be the case precedent for careless driving, and careless driving is a general offense and then there is a more specific one. So for example, following too closely is also an offense, going into another lane is an offense, but careless driving is permissible where there is not – it is a permissible primary offense. If you want to be more conservative in the way that its enforced you would tell the police, we want to see the person swerve or run a stop sign or something like that first, and then you could charge them with that offense or with careless driving and then also charge them with texting. However, it's my office legal opinion and we are also checking with outside counsel, Izzy Reyes, who is a former Circuit Judge, and he is going to formulate an opinion for us, which I'll have for you at the next meeting, but you could use careless driving as a primary offense. The only thing is you

can't simply say they were texting while driving and thus its careless driving that would defeat the purpose of the statute saying it's a secondary offence. They would have to identify specific factors that indicated that careless driving was occurring, which could be they are not looking at the road or they are swerving and then they could pull over for both.

Mayor Cason: When was this legislation passed?

City Attorney Leen: I believe it's 2013.

Mayor Cason: Do we know if our police have given a single ticket involving texting?

City Attorney Leen: I don't know.

Mayor Cason: I talked to the police when I was looking at the Ponce traffic problem. They said unfortunately it's a worthless law, unless you actually catch them, they throw it down, they say they didn't do it, and there is nothing you can do.

City Attorney Leen: But the only way you can check whether they were texting while driving by checking with the, basically the phone company or the internet company is if there was bodily injury or death and then you can, but otherwise you can't, which is why the police told you in their mind they need an admission, they basically need the person to admit they are doing it. However, I still have the view based on the statute that you could combine careless driving with texting while driving, it doesn't require an ordinance. What you could do is simply pass a resolution asking the police department to enforce this to the fullest extent of the law and also perhaps putting something on our legislative agenda for our lobbyist asking them to carve out an area where municipalities could pass stricter laws, that's probably the most you can do that would be safe.

Mayor Cason: When you come back to us would you check factually if we'd issued any citations?

City Attorney Leen: Yes.

Mayor Cason: We've given, I think we mentioned last time like 3,000-some traffic violation tickets in the last year and I would just be interested if – are they really looking for it now?- because you see people all over the place texting.

City Attorney Leen: Yes, I will do that. Find out how many tickets. I will have the opinion for you related to careless driving from Izzy Reyes. I will prepare, if you would like, a draft resolution as what I stated. Would you like that?

Mayor Cason: Look into it and then I think the next time we can discuss whether we want to go to Tallahassee and try to carve out.

City Attorney Leen: OK. I'll do a proposed resolution and you can decide what you want to put in it. I also wanted to raise a couple of matter; I'll figure I'd raise it now under City Attorney Items. I wanted to let you all know that the Retirement Board voted to join our lawsuit related to the actuary. We had a hearing, they heard basically from Jim Linn and myself and then they voted, I think it was unanimous. Elsa was it unanimous?- yes – unanimously voted to join our lawsuit and in fact we are going to be adding some additional claims that the Retirement Board has, so I thought that was a wonderful precedent and a show of cooperation with the Retirement Board. They did ask me to raise with you a request, it's really something I have no position on, but they asked that in the future when there are amendments to the retirement laws they wanted to know who would be OK if staff showed it to them and got their input, that's what they raised, I said I would raise it with you. But anyhow I just wanted you to know that they did vote to join our lawsuit against the actuary and I thought that that was a very good precedent. In addition, I had a few other things, but I'll wait until the discussion section, unless you want me to raise them now.

Commissioner Quesada: This is your time right now.

City Attorney Leen: OK. I'd like to request Executive Sessions in the trolley case and the FPL matter. The FPL matter is coming up for hearing, my understanding is its set for our next Commission meeting, so I would need to meet with you in advance of that if we are going to obtain additional information from you guys to what our settlement position if there was one or what our litigation position or anything like that would be. So I'm asking for that. In addition, I just wanted to let you know that the Corporate Run is on Thursday, we have a great team this year and I wanted to thank the Commissioners for supporting that so well. I want to let you know that I'm going to be teaching state and local government law this summer with the University of Miami as an adjunct professor, just wanted to inform you of that, it will not interfere with my work activities. I'm doing it as a volunteer, so there is no issue about me receiving any income from them.

Mayor Cason: Is it going to be a "gut" course?

City Attorney Leen: It's going to be a what?

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Agenda Item I-1 – Discussion on proposed ordinance to protect orchids
And texting while driving

Mayor Cason: A “gut” course we used to call it in college.

City Attorney Leen: What’s a “gut” course.

Mayor Cason: Be easy or it’s going to be tough grading.

City Attorney Leen: In the middle – moderate.

(Laughter)

City Attorney Leen: And then I wanted you to know that I was appointed to be Vice Chairman of the Appellate Court Rules Committee for the State of Florida.

Mayor Cason: Congratulations.

City Attorney Leen: And I wanted to thank you for all your support.

Mayor Cason: Congratulations.

[End: 12:46:12 p.m.]