



To: Walter Foeman; Billy Urquia

From: Craig E. Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Retroactive Polystyrene

Date: March 15, 2016

The opinion below is issued as a City Attorney Opinion pursuant to section 2-201(e)(1) and (8) of the City Code. I am asking that it be included with Item E-2.

As an initial matter, the City's ordinance satisfies the legal grounds established in case law for a civil law that is retroactive. The City also believes an emergency ordinance is warranted to give immediate notice to businesses that it intends to proceed with and enforce its polystyrene ordinance notwithstanding the attempted (and legally insufficient) effort to preempt the ordinance. Otherwise, businesses may think the City does not intend to enforce the ordinance and may cease efforts to comply with the ordinance in a timely manner prior to when the City starts issuing warnings and then citations. Thus, the City may proceed with the ordinance.

As for the reasons why the legislative act (still subject to veto) is legally insufficient, they are as follows:

- (1) The preemption language allows every presently existing local ordinance to be grandfathered except for the Coral Gables ordinance, which would be the only existing local ordinance preempted. This has the effect of being a special law or general law of local application solely as to Coral Gables, which is impermissible and invalid under the Dade County Home Rule Amendment to the Florida Constitution.
- (2) The preemption language is arbitrary and capricious as it provides no preempting regulations at the state level (instead simply indicating generally that the subject is preempted to an agency), and there is no rational basis to grandfather every existing local ordinance except for the Coral Gables one. This is a basis to challenge the entire preemption legislation.

Ultimately, the City's emergency ordinance would establish a retroactive effective date that predates the grandfathering date. This is reasonable in the circumstances presented because (1) the City could have adopted the ordinance in December as an emergency ordinance, (2) the

grounds for a retroactive ordinance are present, and (3) such emergency action helps avoid litigation as to the constitutionality and validity of the preemption legislation (which is consistent with the doctrine of constitutional avoidance).

Please note, the City reserves the right to contest the constitutionality and validity of the preemption language in the emergency ordinance itself if the Commission wishes to include such language (my office will raise the issue with the Commission at the meeting), as well as in litigation that may arise.

I have written this quickly and as a courtesy to give you information for tomorrow's meeting since I only learned of your appearance on Monday evening. This is not intended as an exhaustive list of the City's grounds for the emergency ordinance, and the City reserves the right to raise additional grounds

From: [Leen, Craig](#)
To: [Paulk, Enga](#)
Subject: FW: Hearing tomorrow
Date: Tuesday, March 15, 2016 2:15:30 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.png](#)
Importance: High

Please publish.

Craig E. Leen, City Attorney

*Board Certified by the Florida Bar in
City, County and Local Government Law*
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com



Celebrating 90 years of a dream realized.

From: Leen, Craig
Sent: Tuesday, March 15, 2016 2:15 AM
To: Foeman, Walter; Urquia, Billy
Cc: Ramos, Miriam; Figueroa, Yaneris
Subject: FW: Hearing tomorrow
Importance: High

Mr. Clerk,

The opinion below is issued as a City Attorney Opinion pursuant to section 2-201(e)(1) and (8) of the City Code. I am asking that it be included with Item E-2.

Craig E. Leen, City Attorney

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Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com



CORAL GABLES
THE CITY BEAUTIFUL

Celebrating 90 years of a dream realized.

From: Leen, Craig
Sent: Tuesday, March 15, 2016 1:23 AM
To: 'Adair, Perry'
Cc: Ramos, Miriam; Figueroa, Yanneris
Subject: RE: Hearing tomorrow
Importance: High

Good evening, Perry,

As an initial matter, the City's ordinance satisfies the legal grounds established in case law for a civil law that is retroactive. The City also believes an emergency ordinance is warranted to give immediate notice to businesses that it intends to proceed with and enforce its polystyrene ordinance notwithstanding the attempted (and legally insufficient) effort to preempt the ordinance. Otherwise, businesses may think the City does not intend to enforce the ordinance and may cease efforts to comply with the ordinance in a timely manner prior to when the City starts issuing warnings and then citations. Thus, the City may proceed with the ordinance.

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- (2) The preemption language is arbitrary and capricious as it provides no preempting regulations at the state level (instead simply indicating generally that the subject is preempted to an agency), and there is no rational basis to grandfather every existing local ordinance except for the Coral Gables one. This is a basis to challenge the entire preemption legislation.

Ultimately, the City's emergency ordinance would establish a retroactive effective date that predates the grandfathering date. This is reasonable in the circumstances presented because (1) the City could have adopted the ordinance in December as an emergency ordinance, (2) the grounds for a retroactive ordinance are present, and (3) such emergency action helps avoid litigation as to the constitutionality and validity of the preemption legislation (which is consistent with the doctrine of constitutional avoidance).

Please note, the City reserves the right to contest the constitutionality and validity of the preemption language in the emergency ordinance itself if the Commission wishes to include such language (my office will raise the issue with the Commission at the meeting), as well as in litigation that may arise.

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Craig E. Leen, City Attorney

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City of Coral Gables

405 Biltmore Way

Coral Gables, Florida 33134

Phone: (305) 460-5218

Fax: (305) 460-5264

Email: cleen@coralgables.com



CORAL GABLES
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Celebrating 90 years of a dream realized.

From: Adair, Perry [mailto:PAdair@bplegal.com]
Sent: Monday, March 14, 2016 7:05 PM
To: Leen, Craig
Subject: Hearing tomorrow

Craig

We have been engaged to oppose the adoption of the attached Ordinance. In my judgment, the City does not have the authority to do what it is attempting to do. The Preamble does not state what the emergency is. Can you enlighten me on that?

Thanks

Perry M. Adair

Office Managing Shareholder
Board Certified in Construction Law

Alhambra Towers | 121 Alhambra Plaza, 10th Floor | Coral Gables, FL 33134
Tel: 305.260.1016 | Fax: 305.442.2232 | [E-Mail](#)
[Website](#) | [Connect on LinkedIn](#) | [Follow Me on Twitter](#) | Skype: perry.adair1

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