



## Planning & Public Safety Committee

January 17, 2017

### Summary and Motions

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Vice Mayor Kay called the meeting to order at 1:01 p.m. Council Members Bledsoe, Gibbs, Henson, Higgins, Mossotti, Plomin, Scutchfield, J Brown and Lamb were in attendance. Council Members, F. Brown, Stinnett, Evans and Farmer were in attendance as non-voting members.

#### I. Election of Committee Chair

A motion was made by Plomin to nominate Mossotti as Chair of Planning & Public Safety Committee, seconded by J Brown. Mossotti accepted the nomination. The motion failed by a vote of 5-5 (Gibbs, Kay, Mossotti, Plomin, and J Brown – yes; Bledsoe, Henson, Higgins, Scutchfield and Lamb – no).

A motion was made by Lamb to nominate Scutchfield as Chair of Planning & Public Safety Committee, seconded by Bledsoe. Scutchfield accepted the nomination. The motion failed by a vote of 5-5 (Bledsoe, Henson, Higgins, Scutchfield and Lamb – yes; Gibbs, Kay, Mossotti, Plomin, and J Brown – no).

Kay asked for Legal to advise what to do in the case of a tie for each candidate. Keith Horn advised that the rules do not address a tie vote. He said it is up to the 10 people elected to the committee to make a selection of chair. Horn said you have to have a majority of the quorum which would be 6 votes to elect to the chair person. He said you can take additional nominations or make the same nominations and see if the vote changes.

A motion was made by J. Brown to nominate Bledsoe as Chair of Planning & Public Safety Committee, seconded by Lamb. Bledsoe accepted the nomination. The motion failed by a vote of 3-7 (Bledsoe, J Brown, and Lamb – yes; Gibbs, Henson, Higgins, Kay, Mossotti, Plomin, and Scutchfield – no).

A motion was made by Plomin to nominate as Chair of Planning & Public Safety Committee, seconded by J Brown. Mossotti accepted the nomination. The motion failed by a vote of 5-5 (Gibbs, Kay, Mossotti, Plomin, and J Brown – yes; Bledsoe, Henson, Higgins, Scutchfield and Lamb – no).

A motion was made by Lamb to nominate Scutchfield as Chair of Planning & Public Safety Committee, seconded by Bledsoe. Scutchfield accepted the nomination. The motion failed by a vote of 5-5 (Bledsoe, Henson, Higgins, Scutchfield and Lamb – yes; Gibbs, Kay, Mossotti, Plomin, and J Brown – no).

Kay asked Legal whether the candidates who tied could be co-chairs. Horn said if the committee could continue with the previous chair for this meeting, we can look into this and you would put off electing a new chair until the next committee meeting.

A motion was made by J Brown to allow the previous chair to chair the Planning & Public Safety Committee for this meeting only, seconded by Plomin. The motion failed by a vote of 5-5 (Bledsoe, Higgins, Scutchfield, J Brown and Lamb – no; Gibbs, Henson, Kay, Mossotti, and Plomin– yes).

Stinnett asked Horn if the vice chair could recognize other individuals attending the meeting and open the floor for more people to vote. Horn said no; if you do not have the 10 people or the quorum, the chair can recognize others to make up the number necessary, but only if you do not have a quorum.

Horn advised having a special meeting of this committee before the Council meeting on January 19, 2016. He said Legal would get back to the committee before then to provide possible solutions.

Kay stated that he would appoint whichever candidate was not elected as chair of this committee to the Budget and Finance Committee.

Farmer asked Kay if there was any reason why he (Kay) could not continue to chair the committee through the agenda today. Kay asked Legal if this was okay. Horn said if there was a motion and a vote from the committee to proceed this way today, you are covered. Kay asked the committee that the rules be suspended and he be allowed to chair this meeting and we will receive guidance from Legal moving forward.

A motion was made by Henson to allow Kay to chair the Planning & Public Safety Committee for this meeting only, seconded by Mossotti. The motion passed without dissent.

## **II. Approval of Committee Summary**

A motion was made by Mossotti to approve the corrected October 11, 2016 Planning & Public Safety Committee Summary and December 6, 2016 Planning & Public Safety Committee Summary, seconded by Henson. The motion passed without dissent.

## **III. Distribution of Unsolicited Materials**

Henson reviewed a couple of changes to the ordinance: making the penalties consistent with other Code Enforcement violations; and moving the hearing board for appeals to the Administrative Hearing Board that hears Code Enforcement violations.

A motion was made by Henson to amend the Distribution of Unsolicited Materials ordinance, seconded by J Brown. The motion passed by a vote of 8-1 (Bledsoe, Gibbs, Henson, Higgins, Kay, Mossotti, Plomin, Scutchfield, and J Brown – yes; Lamb – no).

Henson recognized that there were representatives present who would like to speak on this issue. Kay introduced John Bussian an attorney from Raleigh, NC is speaking at the Lexington Herald Leader's request. Bussian said he was there to see if there was a way to avoid costly litigation. Bussian stated that the ordinance bans the unsolicited driveway distribution of a newspaper. He said the newspaper carries constitutional protection; and anything else does not

come with that. Bussian asked the committee to exempt newspapers from the ordinance when referred to the full council.

Mr. Morgan with the Lexington Herald Leader said they went back 90 days and found one registered complaint out of 1.5 million circulars distributed. He said that this is not a littering issue. He questioned how this can be a litter issue if there have been no complaints about it being a litter issue.

Lamb expressed concern about how this will impact Code Enforcement. She said she has been successful at educating her constituents and providing them a number to call to have it canceled. She asked how this will affect Code Enforcement office and their ability to monitor this. Ken Armstrong said the application process will require work on their part. He said it will have an impact, but he is not sure how great of an impact and they will not know until it is enacted.

Mossotti commented to Mr. Morgan that she does not think this is an affront to the First Amendment. She said when you subscribe to the newspaper, you get a delivery and it is typically on your driveway. She said these other materials are unsolicited and she wants to know if there is another way to find a place to put the materials. Morgan said it is not in their business model.

Farmer asked Mr. Bussian if he has defended the free speech part of this argument in other jurisdictions. Bussian said he has and this is the least known dimension of free press rights. He said you have to have a right to distribute news freely. He said that argument has gone up to the federal appeals court. He said he has experience litigating this issue. Farmer asked if these are distribution cases and Bussian said yes. Farmer asked if this would be the same and Bussian said it would. Farmer said it is incumbent upon us to know our actions can cause other outcomes and this might be one of those that is more far reaching than the legislation itself.

Plomin asked Mr. Morgan about the stop-service and how it works or how is it marketed. Mr. Morgan said it is marketed every week on the community news section and the number is printed on the masthead and it is also on the plastic bag of the product. The phone number you call is direct and does not go through the regional call center. Plomin asked what numbers they have on the opt-out. He said they get about 2-3 a month; they see very few who call or e-mail asking them to stop sending the newspaper. Plomin asked what the ad/editorial ratio is. Morgan could not answer.

Kay asked Bussian if the case at the federal court of appeals was going to be appealed again or if that was the end of the case. Bussian said that one has ended in favor of the *News and Observer* which is the Herald Leader's sister paper in Raleigh. Kay asked about the nature of the distribution that was being litigated and what that issue was. Bussian said in this case it was the choice of the *News and Observer* to distribute by way of news racks which enabled people to receive newspapers when everything else in the airport was closed. Kay asked if this was about placement of the racks and Bussian said yes; broadly it involved the excuse of litter. Kay asked about specific issues in other cases. Bussian said it is the same type of total market coverage products, advertising-heavy supplements. Kay asked if the other cases were still in litigation and Bussian said 2 of them are, but Richmond just ended in favor of the paper.

Henson asked Michael Cravens if it was his or Law Department's opinion that Lexington is violating freedom of speech. It is Law's opinion that this ordinance would withstand first amendment scrutiny. Cravens added that, when challenging the first amendment, a court is going to ask if this is content based distinction or content neutral. He said content-based would be treating newspapers different than other written material; you are defining how you regulate based on the content of the material. If it is content-neutral, you are regulating all written materials regardless of their content. He said the issues being discussed are content-based and our ordinance is content-neutral; so all unsolicited materials will be treated the same. He said if there was a distinction at all, it would be between unsolicited and solicited material which isn't a content-based distinction.

Gibbs expressed concern that Mr. Morgan dismisses the idea of changing the business model. Gibbs said these materials can be considered litter. He added that Morgan did not answer the question about the percentage of news content to advertising material and he would like to know that. He asked that they increase advertising costs even a little and do the responsible thing of putting these materials on the porch. Morgan responded that the business model they have for community news is a sound business model. He said it is hard to answer on the news content versus advertising content because it changes every week. Gibbs asked Morgan to look at the business model because it is contributing to litter.

A motion was made by Henson to approve the Distribution of Unsolicited Materials ordinance as amended and move to the full council, seconded by Scutchfield. The motion passed without dissent.

#### **IV. Vicious Dogs**

Henson introduced Chad Edwards, Department of Law, who presented changes to the Vicious Dogs ordinance. He said these changes were made based on comments from Animal Care and Control and the County Attorney's office to try to remedy concerns regarding the enforceability of the current vicious dog ordinance. He said changes were also made based on Henson's concerns of vicious dogs remaining in the community after an incident has occurred.

James Brown asked if an incident has been reported and animal control arrives, but the dog is not in the act, can animal control take it away if there is given reason that the dog is vicious without seeing the attack. Edwards said they do not have to see the attack; they just need to have probable cause that an attack took place. Brown asked whether the process for determining if the dog is vicious or not is handled in court or by animal control personnel. Edwards said under state law that would be handled by the Fayette District Court.

Plomin asked if there was any consideration given that this could be used inappropriately. Edwards said the reasonable impression of immediate danger means that the person would have to feel like they were about to be attacked. Plomin said she worries about the wording of reasonable impression because it is subjective. Edwards agreed.

Lamb asked about section 4-14(a) where it says any dog that has bitten instead of attacks, a human being. Lamb said a dog can do as much harm with claws and such as it can with a bite.

Lamb asked if there was a reason why the “attacks” was stricken and bitten was added. Edwards said they were trying to mirror state law. He added that state law defines an attack as a dog that is biting or attempting to bite someone. Lamb wanted to confirm that we cannot make our law more stringent than the state law. Edwards said it depends on the circumstances but they can go back and look at changing that to instances where the dog is scratching or clawing at the person.

Mossotti referenced the ordinance and said in the past animal control had to witness the offense or there had to be a photograph. She asked if there was no one to witness the offense and no photograph and someone was attacked by a dog, is there a response for that. She asked if there were no witnesses present, what the recourse is. Edwards said if there are no witnesses there might not be probable cause to remove the dog. Mossotti asked about putting the dogs already labeled vicious on a web site. Edwards said he would look into this. Horn said once a dog is declared vicious, there are pinning and restraining requirements for that dog that must be followed. If the owner violates those, they will have to go back to court to address why the dog is not properly restrained. Mossotti asked about dogs that are bred for fighting. Edwards said the local ordinance says that dogs that are owned or harbored for the purpose of fighting are to be declared vicious.

Henson asked animal care and control to comment on any concerns. Chief Bowling said this ordinance gives them more leeway or more of a tool for instances such as a secondary bite or continuous violation of dog offenses. Under the current law, they have no jurisdictional right to impound a dog that has allegedly attacked someone. He said this ordinance needs some tweaking, but it gives them more of a grasp on these situations.

**No further comment or action was taken on this item.**

#### **V. Items Referred to Committee**

A motion was made by Henson to remove the Distribution of Unsolicited Materials, seconded by Mossotti. The motion passed unanimously.

A motion was made by Plomin to adjourn, seconded by Mossotti. The motion passed without dissent.

The meeting was adjourned at 2:25 p.m.