CAO 2012-022

To: Paul Masdeu

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

RE: Legal Opinion Regarding Fruit Picking Off City Tree

Date: October 15, 2012

I have reviewed your email and the City Code, and agree with the Department's interpretation that section 82-1 of the City Code would prohibit picking fruit from a City tree unless the City grants permission as indicated in the provision. The provision states as follows:

"No person shall, without a written permit from the city manager and director of public service, cut, prune, break, incline, injure, remove or in any other way deface any living tree, shrub or vine, in a public highway or park, or cut, disturb or interfere in any way with the roots of any tree, shrub, or vine in a public highway or park."

The City's interpretation is consistent with the broad, all-encompassing wording of section 82-1. This interpretation is also consistent with the principle that the City owns the right-of-way, as well as the trees in the right-of-way, for the benefit of the public as a whole, and that the City has a right to restrict activities on the right-of-way that could damage a public resource (such as the City's trees).

There are numerous reasons why the City would want to restrict the picking of fruit without the City's permission, including the potential damage caused to the tree itself through the process taken to remove the fruit, the possibility that the fruit of certain trees may not be edible, the potential danger that may occur if a City tree is climbed to pick the fruit in question, and the possibility that trees owned by the public may be harvested for economic gain (such as the example discussed below by you and the Public Service Director regarding coconut palms). Ultimately, the trees are owned by the City on behalf of the public, and a requirement that the City's permission be sought and obtained before fruit is taken, is very reasonable. I have spoken with the Public Service Director, and the City would consider a request to pick fruit from a specific tree. Please let him or me know if you have a specific tree in mind so the City could consider the request.

Hernandez, Cristina

From: Leen, Craig
Sent: Monday, October 15, 2012 7:09 PM
To: Osle, Zilma; Hernandez, Cristina
Cc: Thornton Richard, Bridgette
Subject: FW: Question from a Coral Gables Homeowner

Please place in the opinion folder. Thanks.

Craig E. Leen
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com

From: Leen, Craig
Sent: Monday, October 15, 2012 7:09 PM
To: 'paulbcs@aol.com'
Cc: Tompkins, Jane; Keller, Jessica; Keys, Dan; Thornton Richard, Bridgette; Osle, Zilma
Subject: RE: Question from a Coral Gables Homeowner

Mr. Masdeu,

I have reviewed your email and the City Code, and agree with the Department's interpretation that section 82-1 of the City Code would prohibit picking fruit from a City tree unless the City grants permission as indicated in the provision. The provision states as follows:

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If you would like to set up a meeting to further discuss this issue, I am available at your convenience. Please contact my assistant, Zilma Osle, at 305-460-5219 to do so.

aig E. Leen
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com

From: paulbcs@aol.com [mailto:paulbcs@aol.com]
Sent: Wednesday, September 12, 2012 2:20 PM
To: Tompkins, Jane; Leen, Craig
Subject: Re: Question from a Coral Gables Homeowner

Good Afternoon Ms. Tompkins and Mr. Leen,

Ms. Tompkins - Thank you for your follow-up on this issue and I apologize for my delay in responding to your most recent email.

I would have responded more promptly but I have had "more gum than I can chew." It seems that work always piles up before I go on extended travel and I leave for Asia tomorrow morning followed by a visit to Chicago. I will not be back home until early October. I will contact Mr. Leen when I return to arrange a meeting or phone conversation.

Mr. Leen - I would appreciate it if you could cite to any statute, ordinance or case law that your opinion relies on. This information will help me speak more intelligently during our conversation. I am sure you are likewise busy but with my travel schedule if you could respond to me by October 3, 2012 it would be great.

Again thank you and best regards.

Paul Masdeu
-----Original Message-----
From: Tompkins, Jane <jtompkins@coralgables.com>
To: 'paulbcs@aol.com' <paulbcs@aol.com>
Sent: Thu, Sep 6, 2012 10:51 am
Subject: RE: Question from a Coral Gables Homeowner

Good morning Mr. Masdeu;

I spoke with Attorney Leen late yesterday about your query. He said it's his opinion that the City can prohibit the harvesting of fruit from trees in the public right-of-way. He further indicated that he'd be happy to speak with you about this, if you'd like. He may be reached at 305-460-5219.

Sincerely,
Jane Tompkins

From: paulbcs@aol.com [mailto:paulbcs@aol.com]
Sent: Wednesday, August 29, 2012 9:21 AM
To: Tompkins, Jane
Subject: Fwd: Question from a Coral Gables Homeowner

Ms. Tompkins,
Please reply.
Thank you and best regards

Paul Masdeu
-----Original Message-----
From: paulbcs <paulbcs@aol.com>
To: jtompkins <jtompkins@coralgables.com>
Sent: Tue, Aug 28, 2012 6:38 am
Subject: Re: Question from a Coral Gables Homeowner

Ms. Tompkins,
It has been a week since I last corresponded; please advise me of the status.
Thank you and best regards
Paul Masdeu
-----Original Message-----
From: paulbcs <paulbcs@aol.com>
To: jtompkins <jtompkins@coralgables.com>
Sent: Tue, Aug 21, 2012 4:27 pm
Subject: Re: Question from a Coral Gables Homeowner

Ms. Tompkins,

This is a follow-up for a response from the City Attorney.

Thank you and best regards
Paul Masdeu

-----Original Message-----
From: Tompkins, Jane <jtompkins@coralgables.com>
To: 'paulbcs@aol.com' <paulbcs@aol.com>
Sent: Wed, Aug 15, 2012 4:23 pm
Subject: RE: Question from a Coral Gables Homeowner

Mr. Masdeu,

I've been communicating directly with the City Attorney, Craig Leen. Mr. Leen is on vacation this week but I will certainly be in touch with him as soon as he returns next week, to follow up on your inquiry. If there's anything else I can do in the meantime, please don't hesitate to let me know.

Have a nice evening.

Jane Tompkins

From: paulbcs@aol.com [mailto:paulbcs@aol.com]
Sent: Wednesday, August 15, 2012 2:59 PM
To: Tompkins, Jane
Subject: Re: Question from a Coral Gables Homeowner

Ms. Tompkins,

Thank you for your follow-up last Friday. I agree that the city attorney should be the one to make legal interpretations given that no ordinance specifically prohibits the activity I inquired about.

Have you subsequently received a response from the city attorney's office or an indication as to when a response will be provided?

I would like to bring closure to this matter. If a response from the city attorney's office has not yet been provided please let me know who you are corresponding with so that I may communicate directly with that person.

Thank you and best regards

Paul Masdeu

-----Original Message-----
From: Tompkins, Jane <jtompkins@coralgables.com>
To: 'paulbcs@aol.com' <paulbcs@aol.com>
Sent: Fri, Aug 10, 2012 5:42 pm
Subject: RE: Question from a Coral Gables Homeowner

Mr. Masdeu,

We've requested a legal opinion from the City Attorney. I don't know how long it will take for it to be prepared, but I'll let you know when I receive it.

Thank you,
Jane

From: paulbcs@aol.com [mailto:paulbcs@aol.com]
Sent: Thursday, August 09, 2012 4:26 PM
To: Tompkins, Jane
Subject: Fwd: Question from a Coral Gables Homeowner

Ms. Tompkins,

I just wanted to follow-up regarding my recent email. Please advise when you will respond.

Thank you and best regards.

Paul Masdeu
-----Original Message-----
From: paulbcs <paulbcs@aol.com>
To: jtompkins <jtompkins@coralgables.com>
Sent: Tue, Aug 7, 2012 2:27 pm
Subject: Re: Question from a Coral Gables Homeowner

Ms. Tompkins,

First, I'd like to thank you and Mr. Keys for your prompt reply.

I agree with Mr. Keys that 82-1 clearly applies when the issue involves coconut palms and the removal of coconuts but as explained below I do not agree for the reason he suggested in his email.

Traveling coconut vendors use a long pole with a pruning saw attached to one end. When they use this device to cut coconuts they also cut or "prune" the flowers, fronds and the trunk of the palm tree. As Mr. Keys accurately described the process leaves a bunch of debris behind. Under a "plain language" test this debris demonstrates that pruning took place, which is prohibited by 82-1.

However, my email inquiry does not involve palm trees or coconuts. I inquired about a city homeowner hand picking fruit (such as an apple) for personal consumption from a tree within view of his home. My research did not reveal that this activity is prohibited. In my original email I requested that I be directed to any city code which prohibited that activity and which I may have missed. Mr. Keys response did not direct me to an overlooked city code. Instead Mr. Keys suggested an expansive definition for the word "prune" as found in 82-1 and thus indicated that it applied; I disagree.

I believe that Mr. Key's rational, which re-defines the word "prune" making it applicable to the specific activity I inquired about is, flawed; consequently, his determination that the activity is prohibited by 82-1 is flawed. While there are several reasons for my belief I don't want to make this a comprehensive discussion on the topic (we both have other things to do). I believe a brief discussion will suffice to explain why 82-1 does not apply.

Laws require specificity in order to provide notice regarding what is and what is not a prohibited activity. Code 82-1 does not provide language or reference definitions that would enable someone reading the code to conclude that picking a fruit is equal to pruning. When definitions are not provided within a code or statute the "plain language" applies (and nobody would ever say "this apple is delicious, I just pruned it off the tree").

The way that reference material and definitions contained therein would apply to a code would be if they were "incorporated by reference." However, ANSI A300 is not referenced in any part of the city code (this is not surprising given that ANSI A300 was not in existence when the code was enacted) and thus ANSI A300 cannot be used to provide definitions for any interpretation of 82-1.

There are other reasons why ANSI A300 is not applicable to and may not be used to provide for definitions regarding 82-1, even had ANSI A300 had been incorporated by reference in the code. The Florida Supreme Court has held that Florida municipalities have no power to adopt published codes by reference except to the extent that authority has been expressly granted by statute; I know of no such grant. Further, the referenced material must constitute a public record (such as referencing a Florida Statute) before it can be adopted by reference by municipalities. ANSI A300 standards is instead an industry code with application limited to "professionals who provide for or supervise the management of trees." In short, ANSI A300 provides "terms of art" or a uniform terminology to be used for industry transactions. Such narrowly used terms do not provided an expansion of the plain or ordinary meaning used by laypersons. And even beyond the aforementioned, ANSI A300 does not ever expressly state that picking fruit equals pruning, this just seems to be yet another expansive interpretation.

In summary, I believe the city is still on solid ground regarding the problem with "traveling coconut vendors" which I believe is the real issue of concern. If a resident hand picking fruit for personal consumption is not a problem the city has deemed worthy of codifying please just agree with me that the activity is not prohibited and we can end this correspondence.

Again, thank you in advance for your efforts and best regards.

Paul Masdeu

-----Original Message-----
From: Tompkins, Jane <jtompkins@coralgables.com>
To: paulbcs <paulbcs@aol.com>
Sent: Mon, Aug 6, 2012 3:10 pm
Subject: FW: Question from a Coral Gables Homeowner

Mr. Masdeu,

The email below, from Public Services Director Dan Keys, better explains the City's position on picking fruit and offers the option for you of applying for a permit. If you wish to pursue a permit, please contact that department.

Thank you again for your email and commitment to upholding the City's regulations.

Sincerely,
Jane Tompkins

From: Keys, Dan
Sent: Monday, August 06, 2012 2:46 PM
To: Tompkins, Jane
Subject: RE: Question from a Coral Gables Homeowner

82-1 applies: Picking fruit is in affect pruning (the selective removal of plant parts to meet specific goals and objectives – ANSI A-300 definition) and thus prohibited without permission.

If the issue is coconut palms, then there is even more of an issue as harm to exiting fronds is often done in the process of removing the coconuts. We have issues with traveling coconut vendors who come through and cut coconuts and leave a bunch of debris behind.

They can ask for permission spelled out in the code and if it is appropriate that permission be granted, then we can do so.

From: Tompkins, Jane
Sent: Monday, August 06, 2012 2:14 PM

To: Keys, Dan
Subject: FW: Question from a Coral Gables Homeowner

an,

How would you answer this question? Would you prefer to handle the response yourself?

Jane

From: paulbcs@aol.com [mailto:paulbcs@aol.com]
Sent: Friday, August 03, 2012 4:29 PM
To: Tompkins, Jane
Subject: Question from a Coral Gables Homeowner

I hope this email finds you well.
By way of introduction I am a lifelong resident of Coral Gables and a also homeowner in the city for the past 26 years; during the previous 19 years I have lived at 1717 Country Club Prado.
Yesterday I spoke with one of your Code Enforcement Officers, Adolfo Garcia. During our conversation Mr. Garcia provided information regarding the City's Municipal Code; most of the information he provided I believe is accurate but not all and therefore I wanted your input on the subject.
Please note that this letter is not in any way intended as a complaint regarding Mr. Garcia. During my interaction with Mr. Garcia I found him to be professional, polite and overall a fine representative of our city.
The issue I seek your input on involves a fruit tree growing on a public swale. Mr. Garcia and I agree that both the land and tree are Coral Gables property. The question is whether or not a Coral Gables homeowner can pick some fruit from a tree growing within view of his home for personal (not commercial) consumption. To be simplistic... can I pick an apple (assuming they would grow in this climate) off a tree growing on a public swale? Mr. Garcia suggested that the answer is no and referenced two city codes, 42-23 and 82-1, in support of his opinion.
Section 42-23 involves "Public conduct in parks" and since the code does not define a swale as a city park this section of the code I believe is completely inapplicable to the current question.
Section 82-1 involves " Defacement of trees, shrubs, vines, etc., in public places prohibited without permit." Here again Mr. Garcia and I agree that a swale is a "public place" as defined by the code but I believe that here the code fails to address (and thus not prohibit) picking fruit on tree thus located.
Specifically the prohibited activities, regarding a tree, that Section 82-1 provides are to ". . . prune, break, incline, injure, remove or in any other way deface any living tree. . ." I believe it is clear that the first five verbs in the preceding quote are not applicable to the activity of picking fruit; the last verb, deface, is term that involves doing damage to a tree such as might be done with an ax, saw, bulldozer or graffiti. However, the function of a fruit tree is to bear fruit and fruit trees are not in any way harmed or defaced when fruit is picked by hand. Subsequently, I likewise do not believe that Section 82-1 prohibits picking fruit.
I pride myself in being a responsible and law-abiding resident of the City and would not knowingly engage in any prohibited activity. I do not believe that a Coral Gables homeowner is prohibited from picking fruit from a tree growing on a public swale within view of his home for personal consumption. If you agree with me that this activity is not prohibited by the city code I would appreciate your responding as such. Accordingly, if you disagree I would appreciate your directing me to the section of the code that precisely or with specificity (as is required by law) prohibits the activity.
Thank you in advance for your efforts and best regards.
Paul Masdeu

Under Florida Law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.
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