

The regular meeting of the Town Council of the Town of Front Royal, Virginia was held on September 8, 2014, in the Warren County Government Center's Board Meeting Room. Mayor Darr led Council and those attending in the Pledge of Allegiance to the flag and a Moment of Silence. The roll was called at 7:00 p.m.

PRESENT: Mayor Timothy W. Darr
Vice Mayor N. Shae Parker
Councilman Daryl L. Funk
Councilman Bret W. Hrbek
Councilman Thomas H. Sayre
Councilman Eugene R. Tewalt
Councilman Hollis L. Tharpe
Town Manager Steven M. Burke, P.E.
Town Attorney Douglas W. Napier
Clerk of Council Jennifer E. Berry, CMC

(The above listed members represent the full body of Council as authorized in the Town Charter.)

Vice Mayor Parker moved, seconded by Councilman Tewalt, that Council approve the Regular Council Meeting minutes of August 25, 2014 as presented.

Councilman Sayre moved, seconded by Councilman Tharpe, that the minutes be amended to include Stu Nolan, Jr.'s full electronic comments into the record.

**STATEMENT ON FORTUNETELLING JURISPRUDENCE
TO BE ENTERED INTO THE MINUTES OF THE TOWN COUNCIL MEETING
TO : MAYOR AND TOWN COUNCIL
BY : STUART W. NOLAN, JR., ESQ.
DATE : AUGUST 25, 2014**

This relates to the recent controversy surrounding proposed steps to promote the introduction of fortunetelling and similar commercial ventures into the cultural, economic, and political life of Front Royal. As a preliminary matter, towns surrounding Front Royal as a general rule collect a significantly more burdensome license fee from prospective fortunetelling businesses than does Front Royal under the current Code. In this context, eliminating any confusion regarding whether it is legal to operate such a business in Front Royal will effectively make Front Royal as an "enterprise zone" for the sorts of businesses most local residents would prefer we not attract. I want to raise families in a wholesome environment, not a red-light district. And I want to attract high employment industry and infrastructure, as well as high wage, white collar jobs to the community so that the economy can grow. An economic plan for creating a prosperous business climate most decidedly does **not** begin with attracting snake oil salesmen. Moreover, the recent controversy over proposed changes in the Town Code evidences considerable political opposition to easing regulations of fortunetelling. There appears to be no significant political support demanding that the Town attract more fortunetelling businesses.

However, the foregoing considerations are primarily cultural, economic, and political. The primary thrust of these comments is to be legal. Specifically, I address any notion that the hands of the Town Council may be tied due to the operation of First Amendment jurisprudence in this area. I am an attorney with a business

located in Front Royal. I raise my family in this community and spend our money here. I wish to ensure that policies adopted by the Town are informed by an accurate understanding of applicable constitutional jurisprudence. Reports in the press have suggested that the Town Council has been advised that its “hands are tied” by free exercise (of religion) and free speech case law. This is not so. Confusion on this topic appears to have originated with a law student’s comment, published recently in Mississippi Law Journal, which somewhat cleverly advocated for a specific direction in application of First Amendment principles in the fortunetelling business. I have at least fifteen years experience representing hundreds of clients with religious missions and/or that are active in the media. I am familiar enough with applicable constitutional jurisprudence to state with high confidence that the law journal comment in question does not reflect dispositive law in this country, much less in the Fourth Circuit or in Virginia. The law journal comment conflates various types of First Amendment cases and advocates for the application of certain free exercise “1” and free speech principles in the context of commercial or professional speech. The law journal comment also discusses a recent trend among lower courts in more liberal regions of the country that is sympathetic to moving in that direction.

However, ***neither the Supreme Court nor the Fourth Circuit Court of Appeals has shown any indication that they are prepared to apply a rigorous “strict scrutiny” test to commercial or professional speech cases.*** To the contrary, the Supreme Court continues to afford less constitutional protection to commercial speech, and the recent Fourth Circuit case involving fortunetelling ***actually upheld the regulation in question.*** The remainder of this statement will briefly summarize, and try to eliminate confusion regarding, the relevant Supreme Court and Fourth Circuit cases, and then we also propose a framework for updating the existing ordinances dealing with fortunetelling in a manner that should satisfy those concerned with religious and free expression rights, as well as those concerned with the direction of the Town’s cultural and economic development.

U.S v Alvarez. The Alvarez case did not concern commercial speech at all. It involved a man who had lied about having received the Congressional Medal of Honor. The Court expressly noted that the case involved pure speech, as distinguished from other categories entitled to less protection. The court recognized that some First Amendment protection can exist with respect to false speech, but it did not, for example, invalidate protections against fraud, or call into question numerous regulations designed to protect consumers.

Moore-King v County of Chesterfield. The Moore-King case did involve the business of fortunetelling. The court expressly ruled out the applicability of free exercise (religious) principles because it decided that Moore-King was guided more by a philosophy or “way of life” than by a religion. In any event, both ways of life and religions can be regulated if the regulations are “generally applicable” and not aimed at a particular religion. The Court was not convinced that commercial speech was the best category for fortunetelling and proposed instead that professional speech was the better fit, but it did not substantially alter the analysis or the outcome. In this case, subjecting the prospective business to a background check (no licenses for

convicted felons), collecting a licensing fee, or imposing strict zoning restrictions were all valid tools the government could use to protect consumers. Moreover, the *Moore-King* Court's discussion of the *Alvarez* case, and the idea that courts may be increasingly disposed to recognize a right to dishonest speech, were "*dicta*". The Court did not hold that the business would have been protected even if its predictions had been deemed deceptive. Rather, the Court held that a lower court should have let the matter go to a jury to determine whether the fortuneteller's business was inherently deceptive. This is by no means a sign that the Fourth Circuit, much less the Supreme Court, is ready to throw out well established case law that allows generally applicable regulations on fortunetelling businesses.

_2" The jurisprudence in this area makes clear that regulations need not be the least restricted means available, nor must they be narrowly tailored to address a compelling government interest. Rather, they must be **substantially related** to furthering **important government interests**. This is called "intermediate scrutiny" and is not a difficult threshold to satisfy. In conclusion, if you want to build a robust economy and maintain a wholesome cultural environment for families, not to mention soothe politically any feathers that have been ruffled by this debate, you need only remember the wisdom of any woodsmen. You don't need to be the fastest person running from a bear. You just need to be faster than the slowest person running from the bear. If surrounding jurisdictions that do not ban fortunetelling are charging \$1,000 for a business license, Front Royal should be charging more. Moreover, assessing licensing fees are not the only way, and perhaps not even the best way, to protect consumers from persons in the business of selling predictions about the future. Mandatory disclaimers, customer satisfaction guarantees, and required deposits into escrow of money that will insure fines or refunds get paid, are tools analogous to requirements placed on the tobacco sales, medical professionals, financial investors, and financial institutions.

Accordingly, to the extent our efforts are welcome, I stand ready to assist the Town Attorney in crafting a better ordinance that emphasizes consumer protection in a manner that would not be vulnerable to litigation. Attached hereto is a draft Ordinance revising the two existing ordinances, and I propose this as a starting point that should satisfy all concerned.

Vote: Yes – Funk, Hrbek, Parker, Tewalt, Tharpe and Sayre
No – N/A
Abstain – N/A
Absent – N/A

(By Roll Call; On the Amendment)

(Mayor Darr did not vote as there was no tie to require his vote)

Vote: Yes – Funk, Hrbek, Parker, Tewalt, Tharpe and Sayre
No – N/A
Abstain – N/A
Absent – N/A

(Mayor Darr did not vote as there was no tie to require his vote)

RECEIPT OF PETITIONS OR CORRESPONDENCE FROM THE PUBLIC

Linda Allen, of 416 Salem Avenue, referred to a parked truck with an attached trailer. She explained that the trailer is wider than the truck, and it reduces the road travel way. Ms. Allen noted that it created several conditions with risk to area drivers. She explained that she had been told that nothing can be done because it is attached to the truck. She asked for assistance in locating the truck/trailer reference in the Town Code and for Council to bring the matter up for discussion.

Mayor Darr asked Town Manager Burke to follow up with Ms. Allen on the issue.

REPORT OF THE MAYOR, COUNCIL & STAFF

Town Manager Steve Burke:

- Stated that Cherrydale Avenue would be closed for street maintenance;
- Noted that the Air Show would be held this weekend;
- Announced that the Taste of the Town would be held Friday, September 19th;
- Stated that the Town would be celebrating the improvement work at the Avtex site on September 20th along with the EDA and the County;
- Invited that Council and the citizenry to attend the Happy Creek Trail opening on Monday, September 29th; and
- Announced that the Town would begin airing local news articles through a partnership the local Warren County Middle School and Skyline High School students.

Mayor Darr stated that he attended the Habitat for Humanity groundbreaking event with other members of Council and he wished the family and Habitat well in their endeavor.

Mayor Darr noted that the Randolph Macon Academy Middle School will be performing their quarterly trash pickup along Kendrick Lane on Saturday, and he asked that drivers be safe in that area. He added that the group was always appreciative of those willing to help in the clean-up efforts.

Mayor Darr asked if there were any other proposals for additions or deletions to the agenda.

Vice Mayor Parker moved, seconded by Councilman Funk that Council add Item 11 – Avtex Environmental Covenants to the agenda.

- Vote: Yes – Funk, Hrbek, Parker, Tewalt, Tharpe and Sayre
No – N/A
Abstain – N/A
Absent – N/A
(Mayor Darr did not vote as there was no tie to require his vote)

CONSENT AGENDA ITEMS

- A. COUNCIL APPROVAL – Liaison Committee Meeting Agenda Items
- 1) Warrant County Television Monitor Proposal
 - 2) Discussion to Reinstate Pilot Fees in Rt. 522 Corridor;

and one item to be removed from the upcoming Liaison Agenda:

J. Discussion of the Property Boundary Adjustment Process.

- B. COUNCIL APPROVAL – Proclamation for Red Ribbon Week
- C. COUNCIL APPROVAL – Resolution Granting Authority to Town Manager to Enter Into an Agreement with VDOT for Revenue Sharing Project on Fox Drive
- D. COUNCIL APPROVAL – Acceptance of Donation from Front Royal/Warren County Anti-Litter Council

Vice Mayor Parker moved, seconded by Councilman Tewalt that Council approve the Consent Agenda as presented.

Councilman Sayre noted that the Consent Agenda contained a donation from the area’s Anti-Litter Council.

Vote: Yes – Funk, Hrbek, Parker, Tewalt, Tharpe and Sayre
 No – N/A
 Abstain – N/A
 Absent – N/A
 (Mayor Darr did not vote as there was no tie to require his vote)
 (By Roll Call)

PUBLIC HEARING – An Ordinance to Renew Town Code Sections 180-185.1 through 180-185.21 Pertaining to the Operation of a Public Passenger Bus Service and Amend Town Code Section 180-185.9 Annual Payment and Operation (1st Reading)

Summary: Council is requested to affirm on its first reading an Ordinance to Renew Town Code Sections 180-185.1 through 180-185.21 Pertaining to the Operation of a Public Passenger Bus Service and Amend Town Code Section 180-185.9 “Annual Payment and Operation. If approved the Franchise for Passenger Bus Service in the Town of Front Royal will be extended for a period of five years beginning October 1, 2014 and ending September 30, 2019.

Mayor Darr opened the public hearing. As no one came forward to speak, the public hearing was closed.

Councilman Tewalt moved, seconded by Councilman Hrbek, that Council affirm on its first reading an Ordinance to Renew Town Code Sections 180-185.1 through 180-185.21 Pertaining to the Operation of a Public Passenger Bus Service and Amend Town Code Section 180-185.9 “Annual Payment and Operation for a period of five years beginning October 1, 2014 and ending September 30, 2019.

Councilman Hrbek asked if it would preclude the Town from having discussion regarding route changes or other matters. Mr. Napier noted that it would not.

Vote: Yes – Funk, Hrbek, Parker, Sayre, Tharpe and Tewalt
 No – N/A
 Abstain – N/A
 Absent – N/A
 (Mayor Darr did not vote as there was no tie to require his vote)
 (By Roll Call)

COUNCIL APPROVAL – Resolution for Non-Compliant Utility Properties

Summary: Following discussion, in a previous meeting, of a duplex that was served by only one water and sewer service and does not comply with current Town Code requirements, Council requested a list of potential non-compliant properties with similar utility service. Council is requested to consider approval of a Resolution for the non-compliant utility service residences in the Town of Front Royal, as presented.

Vice Mayor Parker moved, seconded by Councilman Hrbek, that Council approve a Resolution for non-compliant utility service residences in the Town of Front Royal, as presented.

Vote: Yes – Funk, Hrbek, Parker, Sayre, Tewalt and Tharpe
No – N/A
Abstain – N/A
Absent – N/A
(Mayor Darr did not vote as there was no tie to require his vote)
(By Roll Call)

COUNCIL APPROVAL – Authorization for Corridor Letter to EDA

Summary: Council is requested to authorize the Town Manager to send the attached letter to the Economic Development Authority (EDA) Executive Director to provide notice of the Town’s desire to restore collection of meals and lodging taxes as part of the Corridor PILOT program that was ceased by Resolution of the Town Council on March 8, 2010. The authorization to transmit the letter is not intended to rescind the March 8, 2010 resolution, rather to initiate conversation with the EDA and Corridor Business to obtain input about its restoration in January 2015.

Councilman Funk read the following into the record:

As I have stated at the previous worksessions on this matter, my law firm is involved in a legal matter that creates an ethical conflict for me in the consideration of this matter at this time. Therefore, I must recuse myself from discussion and voting on this matter at this time.

Councilman Hrbek moved, seconded by Vice Mayor Parker, that Council authorize the Town Manager to send the attached letter to the Economic Development Authority (EDA) Executive Director to initiate discussion about the possible restoration of collection of meals and lodging taxes as part of the Corridor PILOT Program and to invite the EDA Director to attend the September 18 Liaison Committee Meeting.

Councilman Sayre noted that he debated on the matter and has decided not to support the motion. He stated that the Town should determine if it would pass through to the consumer before it went forward.

Councilman Tewalt noted that it would come back for actual approval at a later date, and this vote was just to begin the dialogue on this matter. Mayor Darr noted that was correct.

Vice Mayor Parker stated that he had some concerns with the institution with the collection of the meals tax and whether it would be fair and uniform on all the businesses in the Corridor, however; the EDA should be involved, though he did not support the notion in general.

Councilman Hrbek stated that he placed it on the agenda in order for the Council to speak on the matter as one voice. He noted that by endorsing the letter it gives justification for the intended use of the funds for a specific purpose, stating that it would recreate a level playing field for those in-Town businesses.

Vote: Yes – Funk, Hrbek, Parker, Tewalt and Tharpe
No – Sayre
Abstain – N/A
Absent – N/A
(Mayor Darr did not vote as there was no tie to require his vote)

COUNCIL APPROVAL – AVTEX Environmental Covenants

Summary: Council is requested to authorize the Mayor, Town Attorney and Town manager to execute all agreements and documentation associated with the modified environmental Covenant associated with the Avtex and future Police Headquarters properties. The covenants have been modified to increase the approved uses of the site and to allow development of the Town owned property as our Police Headquarters.

Councilman Tewalt moved, seconded by Councilman Funk that Council authorize the Mayor, Town Attorney and Town Manager to execute all agreements and documentation associated with the Environmental Covenants for the Avtex and future Police Headquarters properties.

Mr. Napier noted that the changes are relatively minimal for the Town, stating that they are basically allowing governmental use of the Police Department for overnight sleeping in the event of the emergency (snow event, law enforcement emergency, etc.)

Mr. Burke noted that the documents reduce the number of stakeholders, removing the Lord Fairfax Soil & Water Conservation District, with just one single entity, DEQ, now overseeing the new covenants.

Councilman Sayre asked about the covenants allowing minimal sleeping quarters. Mr. Napier noted that it would allow those quarters for the officers.

Vice Mayor Parker stated that hopefully this would mean that the community would obtain a little bit of positive press for the event on September 20th for the planned event, though if nothing else, they have made progress for the Police Department construction.

Mr. Napier thanked Congressmen Wolf and Goodlatte for their assistance during this process.

Councilman Tewalt asked about whether the site would be released on September 20th. Mr. Burke noted that the EDA believes that the 20th will truly be a celebration.

Councilman Sayre asked about the section relating to overnight accommodations. Mr. Napier stated that it referred to hotels, etc., and the Town Public Safety building use is permitted. Mr. Sayre noted that to clarify the Council just received the documents at 7 p.m. this evening; Mr. Hrbek stated that Council actually received them much earlier.

Vice Mayor Parker noted that the Town is listed as a grantor, and asked if the Town would be required to pay the fees and send the copies, etc. Mr. Napier stated that the EDA has made the filing in the past, though the Town may process the matter, as it has only been a \$21 fee in the past.

Vote: Yes – Funk, Hrbek, Parker, Sayre, Tewalt and Tharpe
No – N/A
Abstain – N/A
Absent – N/A
(Mayor Darr did not vote as there was no tie to require his vote)
(By Roll Call)

There being no further business, the Mayor declared the meeting adjourned at 7:24 p.m.

APPROVED:

Jennifer E. Berry
Clerk of Council