



Jim Newberry
MAYOR

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
Citizens' Advocate Ombudsman Office

MEMORANDUM

TO: Mayor Jim Newberry
Vice Mayor Jim Gray
Council Members

From: Joan R. Beck
Citizens' Advocate Ombudsman

Date: July 10, 2009

Re: 2nd Quarter 2009 Activity Report

A large number of calls to the Citizens' Advocate Office in the second quarter of 2009 resulted in referrals. This may seem to be less than the best use of our resources. But we endeavor to respond to all calls, even those which we cannot handle substantively. This quarter we put citizens in touch with the right person to: appeal a property tax assessment, contest parking fees, report housing fraud, seek consumer protection and organize a charity fund raiser.

We received several calls that were transferred from LexCall. It is very rewarding to see a closer relationship develop, whereby each office can fulfill its responsibilities cooperatively. We also discovered an anomaly when our roll-over calls were forwarded to LexCall instead of to our voice mail. With their help we were able to identify the problem and get it remedied quickly.

With construction season in full swing, it is not surprising that several residents were disturbed with street and utility construction. We are happy to report that Robert Bayert and his staff have responded very promptly to each and every inquiry, and work to minimize disruptions to traffic patterns. Planned projects also generated citizen complaints; we have been able to help citizen's find the proper venue to voice their opinions.

The Citizens' Advocate Office engaged in several forums during this quarter. We attended a neighborhood association meeting in the 1st Council District. We participated in the Neighborhood Leaders Forum, and offered to leaders a traveling workshop on neighborhood dispute resolution techniques. We offer this short training (about 2 hours) for neighborhood leaders who seek new ways to help residents work out differences. We visited with the Tree Board and offered assistance with teaching residents the proper care and maintenance of street trees. We met with Jimmy Emmons and Kevin Wentz to help set up a resolution system for dealing with infill and redevelopment conflicts.

The Coalition of Federal Ombudsman, an organization of more than 100 ombudsmen from various federal agencies, invited me to speak to their members on two topics. I participated in a panel that discussed various ombudsman forms (internal, external, organizational or classical), and also on analysis of proposed federal legislation in the area. The travel was paid for personally, but put a spotlight on Lexington for its historical perspective.

H O R S E C A P I T A L O F T H E W O R L D

➤ **Steps in the Right Direction:**

Neighbors of the Lexington Recycling Center - officially known as the Material Recovery Facility (M.R.F.) - have been disturbed by early processing noise, by debris and by close and uncomfortable interactions with workers. The neighbors were very vocal about the effects of the disturbances on their peace of mind.

This office visited the site and the neighborhood. We interviewed the immediately adjoining neighbors and others in the neighborhood. We discussed the operation with representatives of the Department of Law, Waste Management, and Council Staff.

After numerous meetings and telephone conversations, the management of the M.R.F. has undertaken two positive steps to resolve the dispute. A new privacy fence has been installed around the area. This will help reduce debris blowing into the adjoining yards, and will also allow residents to enjoy their back yards free of observation by workers. Workers also will have a better atmosphere in the area where they take breaks. Also, the processing hours have been shifted to a later start time, and loud unloading has also ceased in the area closest to residents.

We applaud Mr. Feese, Director of Waste Management, for taking action to reduce the impact of the M.R.F. on the neighbors. Operations such as the Recycling Center are certain to create noise, smells, and other potentially offensive effects. When the operation is adjacent to homes it is doubly important to be mindful of the effects and to minimize the impact on neighbors. These steps indicate a willingness on the part of Waste Management to give consideration to the neighbors.

➤ **A different perspective on water:**

A woman purchased one of the first new homes in a new subdivision. The house is bounded on 3 sides by new streets; another new house is on the next lot. The house is built on a slab. The subdivision developer is also the home builder. Shortly after she moved in she noticed that storm water crossed her lot beyond the easement areas adjacent to the lot lines, and that the storm water remained on the lot long after the rain ended; in other words, the storm water seemed to invade her lot too far and too fast and then did not leave as it ought. Evidence of water along the foundation is apparent. The storm water has washed out the topsoil and grass seed on several occasions. She complained to the developer and to the Division of Engineering. Engineering did respond with Letters of Noncompliance and Notices of Violation to the developer. The Division of Water Quality issued citations to the developer as well. Parts of her lot were reseeded and additional straw was placed on top of the grass seed.

This citizen of Lexington asked Engineering to require the developer/builder to comply with the grading plans for the subdivision. After several discussions she came to believe, in her opinion, that compliance with grading plans would not be verified. When she asked at a public meeting if it would take a lawsuit to get Engineering to act, all discussion ended. She was informed to file a claim with Risk Management. She filed a claim, which was denied. This sets the stage for litigation.

This scenario is upsetting for several reasons.

When a new subdivision is platted, the developer must install all the public facilities: water, sanitary sewer, storm water management facilities, streets, sidewalks, erosion and sediment control best management practices, etc. While homes are being built the Division of Engineering ensures that public facilities are not damaged by the home builders, or that public facilities which are damaged by the builder are also repaired by the developer. However, that oversight does not extend to the grading of the lots. Lots are visually inspected for drainage and for existence of drainage swales. The grading of the lots is an integral part of a fully functioning storm water management plan; water must get from the lots to the pipe or pond. Without oversight builder often alter the grades so that water cannot follow the intended path. The current regulations, only requires a plan to keep the flow of water FROM THE DEVELOPED SUBDIVISION no greater than it was predevelopment. The problem is that designing a development in this fashion allows for creation of storm water drainage problems within the subdivision.

Any plan that is required ought to be enforced. The grading of each lot is critical to the functioning of the storm water management plan for the entire subdivision, and even the watershed. Since a drainage plan is required as part of the development acceptance process, it is logical to assume that it will continue to be relevant through the home building process as well. Even though the lot is private property, the regulatory authority, the LFUCG, has a duty to ensure that its regulations are followed. It also has the last best chance to ensure compliance, by giving full scrutiny to the construction plans, through requiring submission of as built surveys, and through requiring that finished floor elevations rationally relate to the finished grade of the subdivision as shown on a final as built survey. This is not a private matter between the builder and the buyer; it is a public matter that implicates the health, safety and welfare of all residents of Lexington. Lexington ought to recognize that control of storm water and storm water management facilities is a public safety matter of city-wide concern. We do not hesitate to inspect and verify construction of the home on the lot so we should also inspect and verify the grading of the lot on which the house is built. This complaint is not new; indeed we have brought this to the attention of Council most recently a year ago. **Recommendation: that the Services Committee and Planning Committee study the construction regulatory system as it effects storm water facilities, to determine whether public safety is being served appropriately.**

Ending discussions is a mistake. As we have brought up before, forcing a party into litigation is expensive for everyone. When the government stops listening, it loses its best opportunity to avoid litigation and to fix its problems. Your attorneys and insurers will advise you to avoid making statements that may be used against you. In some instances that advice will serve you well. But the experience of other entities is that continuing the conversation reduces the number of lawsuits by one third and reduces the amount of judgments by half. The reason is that when people believe they have been heard they are more likely to find resolution. Also, continuing the conversation raises the likelihood that the error or fault might actually be found and cured. Most lawsuits are filed not about money but about accepting responsibility for harm. The risk of continuing the conversation is that someone might admit an error and that admission might be used against him or her later in court. The experience across the country and around the world is that the reward far outweighs the risk. When people can talk about the injury and its cause, the corrective action can be taken and injured parties feel much better about the result. Often we are reluctant to enter into the conversation for fear that our words may be used against us in court later, to prove liability. The problem is how to continue the conversation without risking liability exposure. **Recommendations: Refer to the Intergovernmental Committee a direction to establish a pilot mediation program. Such a program would guide the Department of Law and the Division of Risk Management to divert a limited number of initial claims (prior to adjustment) to mediation and to bring back to the Committee a report on the number of cases mediated, the settlement rate, and an analysis of settlement terms or topics other than money. Currently many court cases are ordered to mediation before trial. We suggest that it may be more productive and more cost effective to move up mediation in the process, so that an injured party has the opportunity to reach a satisfactory settlement before incurring the expense of filing a lawsuit. That may also save the government money by reducing the amount of attorneys fees related to a claim. In Kentucky mediation is protected from introduction as evidence. Submitting a dispute to mediation removes the biggest hurdle, the risk of admissions being used as evidence. It is possible, then, that more claims may be settled if the government is more able to negotiate freely. In other words, let's see if we can settle claims by fully listening to the complaint, admitting errors where appropriate and correcting procedures so those errors are avoided in the future.**

STATISTICAL DATA:**2nd Quarter of 2009**

Complaints Received this Quarter: 35

Activity This Quarter:

(04/01/2009 - 06/30/2009)

Cases Closed:	29
Cases Pending:	6
Pending Cases Rolled over from previous quarters:	2

Top Complaints per Department:

8	Public Safety
7	Public Works & Development
4	Finance & Administration
17	Outside Agencies

Council District Totals:

1	James	6
2	Blues	0
3	Lawless	2
4	Beard	2
5	Feigel	1
6	Stinnett	2
7	Crosbie	1
8	Myers	4
9	McChord	0
10	Martin	0
11	Henson	3
12	Lane	2
13	Anonymous	12
		35

Type 1:

Assistance = 3
Complaints = 24
Informational = 8

Type 2:

Email = 3
Fax = 0
Phone = 22
Visit = 8
Written = 11

Type 3:

Jurisdictional = 19
Non-Jurisdictional = 16

Citizen Quote for the Quarter:

"Thank you so much for taking time out to address my email. Whereas it may seem that you were unable to help me, each suggestion takes me a step closer in my vision. Nothing good and worthwhile comes easy."