Burlington City Council Ordinance Committee 2/23/2016

City Council Ordinance Committee

Tuesday, February 23, 2016

Contois Auditorium, City Hall—5:15 p.m.

DRAFT MINUTES

Attendance

Committee: Councilors Max Tracy (MT), Sharon Bushor (SB), & Chip Mason (CM) (chair).

Other City personnel: Eileen Blackwood (City Attorney) (EB); David E. White (DW) (PZ Dir), Peter Brown (Deputy Fire Chief)

Committee Staff: Sr. Asst. City Attorney Gene Bergman (GB)

Public: Jay Diaz (ACLU), Jessica Owens, Casey Wolff, Jodi Moore,

CM convened the meeting at 5:22 pm

1. **Agenda:** SB moved to approve the agenda, MT 2d, and the agenda passed unanimously.

1. **Minutes of 2/2/16:** SB moved the adoption of the minutes with 2 minor amendments (page 1, second to last line, add "and SB seconded" after "Action: CM moved"; and page 3 add "Public Hearing" before "PH"). MT added 2 other changes to page 2 (deletion of "and the process was good" on line 2 and the addition after "MT thinks the system doesn't enhance transparency and so he does not support it." of the following: "MT asked Zach Hughes if he'd heard of a case in S. Carolina where Uber missed a conviction on a background check, allowed that person to drive, and then the person committed an assault. Zach said he had not."), which SB approved of. MT seconded the motion and the 2/2/16 minutes as amended were adopted unanimously.

1. **Public Forum: no one came forward to speak.**

1. **Ordinance Discussion**

4.01 Comprehensive Development Ordinance (CDO) Amendment #16-01, Thresholds for Major Impact Review

CM asked DW to explain the proposed amendment. DW said the Major Impact Review (MIR) ordinance was established in the 1980s to look at the scale of projects and their impacts on municipal services and infrastructure. Planning & Zoning (PZ) and the Planning Commission (PC) feels that it has outlived its usefulness and been supplanted by specific ordinances like stormwater ordinance. The ordinance's "one size fits all" approach doesn't work either. DW said the table lists project types and the triggers of major impact review. He pointed to sections 4-7 which are proposed to be deleted because they are duplicative of other ordinances and went through them individually to explain.

SB asked about the parking deletion. She said that if you have 50 parking spaces there will be an impact on the traffic. DW said it is captured through the review of the scale of the entire project. The committee discussion then involved the way the development footprint would deal with the traffic and parking issue and the other ordinances that deal with parking. The committee discussion on the wetlands provision was similar.

CM pointed out that these matters go to the DRB but DW said the other ordinances would be raised before the DRB too. On brownsfields, DW said it is the impact not the location that is important.

SB said on the multiple projects, the cumulative impact may be what is most important. You can have a number of projects that individually don't meet the level of MIR but cumulatively they can. She cited Ward One as a place where this happens a lot due to the plans of UVM and the Hospital/Medical Center. DW agreed that most of the burden is on the institutions since they own such large parcels. The current law is only tied to the owner (who is doing the work) and not the work itself. He said it should be on the work itself, not who owns the property. SB said she's appreciative of the distinction between the individual applicant and the cumulative impact but she noted that this more critical review for projects is warranted. DW said true but it isn't the owner that is important. Nonetheless, there is a provision to discourage circumvention of the process by keeping it for applicants developing on adjacent properties.

DW said, for sections 1-3, which are also proposed to be deleted, that the location of the development is very important when trying to review impacts on services and land capacity and other things. Downtown development is different than development in other areas. Five units of housing in downtown has no impact on municipal services but it isn't necessarily true in another section of the city. Therefore, the PC proposes to have this MIR relate to the various zoning districts. One size doesn't fit all. The proposal eliminates the MIR in the downtown but creates different triggers for the mixed use, residential and recreation districts. This relates to where we expect development to take place and where we don't. DW acknowledged that the amendment didn't contemplate going through a pre-development NPA process, as is the case now, and which is going well, and so DW proposed an additional amendment to not lose the pre-application neighborhood meeting.

MT questioned the trigger levels in the ordinance. He doesn't support it as proposed. He also noted the proposed Form Based Code for downtown and said that the MIR change when combined with other proposed changes like the Form Based Code feels like they are proposing a loss of regulatory control over development that people are not clamoring for

and he is not, therefore, supportive of.

SB said she was disappointed that the PC proposal didn't include the neighborhood review process. She agrees with MT's points. She can go along with the recommendations that delete items that will be getting review anyway because the MIR is duplicative. She understands that this was the PC's best effort but she doesn't agree with the end product. She is very concerned with the institutional core campus aspect of the proposal; even small projects have an impact on the neighborhood. Eliminating that review is something she cannot support. As for thresholds, she feels some of the proposed numbers are pretty high. She's ok with the changes to the wetland review and the new language. She'd like new language regarding cumulative impacts.

CM asked what the committee would like to do: vote the proposal down or try to amend it?

DW said the key is to understand what the review is looking at. What are the actual impacts based on the MIR criteria. He reviewed the MIR standards. His experience is that it is rare that any project actually impacts the listed standards adversely, save traffic. There isn't, also, a level of review that is lost, just the elimination—if this is adopted—of a hoop to have to jump through needlessly.

CM agreed that traffic is a real problem in the neighborhoods. DW said that site plan review is a place for that to be reviewed.

SB said she'd be deleting a lot and adding other things that are important. She noted Centennial Woods as an example of an area where institutional development should be getting this review. She said that a number of the review criteria have had value. She suggested that either there be an OC work session or that they to send it back to the PC to work on. MT said his preference is to kill it now because there is enough wrong with it and it doesn't seem to be onerous and there are other things they are doing to streamline the permitting process. He hasn't heard people call for deregulating major impact review.

CM closed the item without the committee taking action.

4.02 Offenses & Miscellaneous Provisions—wearing mask, hood or device to conceal identity

CM asked EB to explain the revised proposed amendment. EB said this came to the committee for first reading regarding changes for performers but in the time between the first reading and now the CA's office has heard constitutional concerns from the ACLU. The CA's office looked at the issue. It found that the origin was in response to KKK activity. There are several models the office looked at. The CA decided to focus on prohibiting masks when the mask was used to commit crimes.

Jessica Owens, representing VT Furs--a group of artists who use costumes in performing on the street--spoke. Her group has been engaging in public artistic activities for years. A few years ago, she was told by the BPD to get a street entertainment permit to be on Church St. in costume. They did. Then when they showed up at Mardi Gras in costumes, they were told they could not be there in costume. She said that the ordinance goes against her first amendment rights and against people's right to protest. She wants the ordinance to allow her group to be present in costume at Mardi Gras, the waterfront, and other events. She knows there are concerns about criminals but in this country you are innocent until proven guilty.

Casey Wolff, said that in 2011 he got his first costume and his sister loved it. The two of them went to Church St. in 2012 in costume without any problem. The problem in 2014 meant that they lost their best venue. He hopes the committee considers that and makes the city a better place.

Jodi Moore, a new member of the group, said wearing a costume makes a person one with the character. She described the amazing reaction of a little child to her being dressed in an Easter Bunny costume.

Jay Diaz, ACLU Attorney and Public Advocate, thanked the group for coming and speaking. The CA's revisions are greatly appreciated and the proposal has gone very far, moving from a very unconstitutional ordinance to one that is somewhat unconstitutional. The ACLU would like the ordinance repealed. It is overbroad, vague and prevents people from expressing themselves and engaging in expressive speech. The law is old and has many unintended consequences. We need to allow free expression even if we don't like it. He noted that ACLU received 2 recent complaints by people who were chilled from going to a protest against Trump because of the ordinance. The police records disclosed under the Public Records Law over the last few years found a couple of incidents, one in which a person was cited for wearing a scarf and hat. As this is an election year, protests are likely to occur and people should not be chilled from participating because of this ordinance. Changing the law will also avoid unnecessary litigation.

As for the current draft, he suggests striking subsection (a) because it is unnecessary and vague. The language doesn't do anything. How can a person just wearing a mask deprive someone of a civil right? Subsection (b) is like the existing state disorderly conduct law so it is duplicative and unneeded. ACLU does appreciate the motivation behind the law but wants to avoid unintended consequences. He asked the committee to write the mayor asking the city to suspend enforcement of the law.

SB thanked Attorney Diaz for his perspective and asked the CA for her position on (a) and (b). She says she reads the provisions as linking the wearing of a mask with behavior and so she is not inclined to remove these provisions. She noted that her children when they were young were scared of people in masks and that people can act in a way that when coupled with the wearing of a mask is intimidating. Attorney Diaz said the existing law already gives the police the authority to stop someone from intimidating people and the right to have people identify themselves.

CM asked EB for a comment on subsection (a). EB said it captures the origin of the law, to make clear the historical background of the ordinance. Subsection (b) is to also make it clear in the ordinance what is intended to be prohibited. The revisions make clear that just wearing a mask to entertain or protect you from the cold or for a religious purpose is not a violation. She said the police chief is supportive and he wants the ordinance to be clear.

CM asked that the November 12, 2015 ACLU letter and letter from VT Comic.com be introduced into the record.

MT asked how subsection (a) would work. EB said it focuses on the putting on of a mask to intimidate a person. MT asked if (b) could work when the activity is not subject to the disorderly conduct law. CM expressed a concern about an incident in front of Planned Parenthood during the weekly protest recently as an example of a situation where the person in a mask was not engaging in disorderly conduct but the context of the person being there at the same time as the protests made the situation concerning; he called the police to investigate but when the police arrived, the man ran away. EB said this provision gives the police a tool to investigate suspicious activity. Diaz said the police intervention is what they are worried about because it has a chilling effect on expressive conduct; he also said that intent is in the eye of the beholder without other conduct. EB said this is not a criminal statute but that criminal statutes always rely on intent.

EB noted that the federal Second Circuit precedent is that a person doesn't have a right to appear in public anonymously. She acknowledged that the ACLU does not agree with the circuit court.

SB said she is looking to protect both free speech and those who are intimidated by masks.

MT tends to agree that the lack of specificity in (a) and the duplicative nature of (b) are problems. He thinks the proposed revisions make a big step forward nonetheless. CM appreciates the work as well and will support it as a dramatic improvement over where we were.

SB asked about the suspension of the enforcement of the law and EB said she thought it would be problematic but the mayor will make a statement regarding the suspension of enforcement during Mardi Gras.

Action: MT moved to refer the amended § 21-36 back to the council for second reading, with a recommendation of adoption. SB seconded. The motion passed unanimously.

4.03 Fire – Fees for special events, festivals, § 13-47

CM asked EB to explain the amendment. MT had to leave (7:00 pm). EB said this was sparked by the cost for special events that exceed what is being charged and the increase in what the city is obligated to pay for coverage under the union contract for this duty. Now, there is no charge for equipment or supplies for that are being used. EB noted that the

CAO has no problem with the council setting the rate or that actual cost can be specified.

SB noted that she wants parameters to limit the amount that is charged. EB suggested adding "to reflect the actual cost to the city." after the word "annually" on line 14. CM said he didn't see a reference to any cost but personnel. EB agreed and suggested "including but not limited to personnel, supplies, equipment and materials" on line 13 after the words "additional coverage".

DC Brown asked for a change to line 20 by changing seven to 14 and deleting the word "work." CM and SB agreed with the changes suggested by EB and DC Brown.

Action: SB moved to refer it back to the council for second reading as amended, with a recommendation of adoption. SB seconded. The motion passed unanimously.

1. **Other business. None.**

Adjournment: CM adjourned the meeting at 7:15 pm.