City of Bloomington
Common Council

Legislative Packet –Addendum

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Wednesday, 01 March 2023

Regular Session at 6:30 pm

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City of Bloomington
Common Council

Special Committee on Council Processes
Report to Council
March 1, 2023

1.0 Summary of the Special Committee's Work and Recommendations

At its February 1, 2023 Regular Session, the Bloomington Common Council heard a motion to remove Greg Alexander from the City of Bloomington Traffic Commission. The motion was stated as follows:

> "I move that Greg Alexander be removed from the Traffic Commission for the following cause: posting obscene and inappropriate statements, including statements directed at and antagonizing members of the public, that are unbecoming of an appointed member of a public body, which have diminished Mr. Alexander's ability and fitness to be an effective member of the Traffic Commission and to represent the best interests of the City."

Following initial discussion, the Council voted 9-0 to refer the issue to the Special Committee on Council Processes. With that referral, the Special Committee took up examining the legal issues surrounding the removal of a commission member, developing recommendations on what constitutes cause for removal, developing recommendations on the process used to consider removal, and returning recommendations specific to the question of Greg Alexander's removal from the Traffic Commission. The Council requested that the Committee provide its report and recommendations by March 1, 2023.

The Committee met three times during the month of February to consider these issues. Members of the Committee are Councilmember Matt Flaherty (chair), Councilmember Isabel Piedmont-Smith, Councilmember Dave Rollo, and Councilmember Sue Sgambelluri. Councilmember Rollo recused himself from the Committee's work on these issues due to the fact he is the councilmember who made the motion on February 1 to remove Mr. Alexander from the Traffic Commission.

The Committee was assisted in its work by Council attorneys Stephen Lucas and Ash Kulak and Council staff. In addition to this report, Council attorneys provided legal guidance to members on issues related to removal of a commissioner, which this report draws from.

During its three meetings, the Committee received public comment from several residents, including Councilmember Volan, a current Traffic Commission member, and several others. Comments ranged from feedback or input on the questions the Committee was considering, to calls for Mr. Alexander's removal, to praise for Mr. Alexander's work on the Traffic Commission.

At the close of its final meeting, the Committee voted on several recommendations. First, the committee recommends that the motion for removal on the table be withdrawn in favor of a new motion for removal should a councilmember wish to make a motion. With respect to a possible new motion, the Committee recommends to the council the following:

> 1. That substantive due process considerations advise that a motion for removal of an appointed board or commission member *for cause* should be narrow, specific, and sufficiently clear that city council members, members of the public, and the appointee in question fully understand the specific conduct, statements, or omissions that have led to the proposed removal.
>
> 2. That procedural due process considerations advise that the commission appointee in question be given at least five (5) business days to respond in writing to the specific allegations and proposed basis for their removal.
>
> 3. That legal precedent with respect to cause for removal advises that a council member making a motion for removal should clarify the relevance of and logical connection between the named conduct and how, specifically, those acts or omissions have diminished the appointee's ability or fitness to perform the duties of the appointment as defined by Bloomington Municipal Code or statute, including any evidence demonstrating this diminished ability or fitness to perform the specific duties.

Because the Committee anticipates an updated motion in line with the above guidance, the Committee declined to make a recommendation with respect to a yes or no vote on the motion for removal on the table.

The rest of this report proceeds as follows: a summary of legal issues, recommendations with respect to Mr. Alexander's removal, and considerations for future action.

2.0 Summary of Legal Issues

2.1. Removal "for Cause"

The first major legal issue is what constitutes cause for removal. Bloomington Municipal Code 2.08.020(4) requires cause for removal of a commissioner except as otherwise provided by code or statute. A list prepared by Council attorneys is provided in supplementary materials to this report, which shows the standard for removal for each of the City's boards and commissions. While most require cause, several have "at will" appointments who may be removed for any reason (or no reason), since the appointees serve at the pleasure of the appointing authority. Removal from the Traffic Commission requires cause.

What constitutes cause is not defined in code or statute except in the case of absenteeism. Guidance on what else constitutes cause in this context comes from the courts, including highly relevant guidance from the recent Indiana case of *Waller v. City of Madison*. Supplementary materials to this report include the full opinion from the Indiana Court of Appeals as well as the Jefferson Circuit Court's findings on remand aided by guidance from the appellate court.

In the *Waller* case, the Court of Appeals concluded that cause for removal consists of acts or omissions that diminish an appointee's ability or fitness to perform the duties of their appointment. In applying this standard, the trial court found that a heated, argumentative exchange between Waller and the Mayor that happened during a Board of Public Works and Safety meeting did not constitute cause for Waller's removal from the Board of Zoning Appeals (BZA) or Plan Commission (PC). The trial court noted that the heated argument occurred in a meeting unrelated to Waller's board and commission service and pointed to evidence that demonstrated Waller had effectively fulfilled the duties of his service on the BZA. Any disruption caused by the argument did not have sufficient nexus to Waller's board and commission service to amount to legal cause.

Synthesizing this guidance, Council attorneys noted it is important for the Council to define and consider the following with respect to questions of removal for cause:

- What is the behavior in question that purports to justify the appointee's removal?
- What is the relevance of this behavior to the board or commission on which the appointee sits?
- How has the appointee performed on the board or commission thus far?
- Have any of the behaviors in question occurred during board or commission meetings?

Another question the Committee considered is the timing of conduct and whether statements that were made prior to the dates of the current appointment may be considered in evaluating cause for removal. Such statements may be considered by the Council if it believes they demonstrate a commissioner's diminished ability or fitness to perform their duties during their current term. However, the farther removed in time the past conduct is, the more difficult it may be to demonstrate this.

2.2. Due Process Issues

There are two types of due process issues that removal of a commissioner may raise. The first is known as procedural due process and involves the procedural steps by which an appointee is removed. Generally, an appointee must be given notice and have an opportunity to be heard (or to respond). Since Bloomington Municipal Code 2.08.020(4) gives appointees who face possible removal for absenteeism five business days to submit extenuating circumstances in writing before a decision on removal is reached, the procedures used for other removals for cause should at minimum follow the same process.

The other process concern is known as substantive due process, which requires the government to provide a rational basis for its actions and requires that its actions are not arbitrary or capricious. In the context of commissioner removal, the Council should describe the conduct, statements, and/or omissions that it believes amount to legal cause for removal.

2.3. First Amendment Issues

If an appointee is removed based on their statements or conduct, it is possible the removal may constitute unlawful retaliation if the speech is protected by the First Amendment. In making this determination, courts utilize a frame of analysis known as the *Pickering* test, which is borrowed from the employment law context. The *Waller* court applied this test in the context of removal from a board or commission. The test looks at: (1) whether an appointee's speech was on a matter of public concern, (2) the government's interest in running an efficient operation weighed against the appointee's interest in speaking on the matter, and (3) whether the content of the speech was the motivating factor for removal. Council attorneys also provided guidance on what types of speech are unprotected, including obscenity, fighting words, and true threats, as well as the legal standards for each.

3.0 Consideration of Greg Alexander's Removal from the Traffic Commission

The Committee sought to apply relevant legal guidance to the question of Mr. Alexander's removal from the Traffic Commission to ensure that any removal is done lawfully. In doing so, the Committee reached several recommendations which are outlined in the first section of this report and elaborated on here.

3.1. Substantive Due Process Considerations

First, the Committee recommends that the motion for removal on the table be withdrawn. The Committee reached this conclusion because it believes the motion does not adequately describe the conduct, statements, and/or omissions that are the basis of the proposed removal. This raises concerns with respect to fairness and substantive due process. To address these concerns, the Committee recommends that a motion for removal should be narrow, specific, and sufficiently clear such that councilmembers, members of the public, and Mr. Alexander fully understand the specific conduct, statements, and/or omissions that have led to the proposed removal.

3.2. Procedural Due Process Considerations

The Committee also recommends that Mr. Alexander be given written notice of his proposed removal and allowed five business days to respond in writing to the specific allegations and proposed basis for his removal. This recommendation parallels procedural requirements from Bloomington Municipal Code 2.08.020(4) for removals for absenteeism and should provide sufficient procedural due process. Similarly, if the Council votes in favor of Mr. Alexander's removal, he should be notified in writing about the removal and the Council's reasoning.

3.3. Cause for Removal

Based on legal precedent and advice from Council attorneys, the Committee also recommends that a Councilmember making a motion for Mr. Alexander's removal not only clarify what specific statements or conduct are the basis for removal, but also clarify (or demonstrate with evidence if available) how the named conduct has diminished Mr. Alexander's ability or fitness to perform his duties on the Traffic Commission. This will help ensure the Council is following the appropriate legal standard with respect to what constitutes sufficient cause for removal.

3.4. Free Speech Concerns

If Mr. Alexander is removed from his appointment, depending on the statements cited as the basis of his removal, he may be able to challenge the removal on the basis that his speech is protected under the First Amendment. As outlined in Section 2, such a claim would be analyzed using the *Pickering* test.

Council attorneys assessed possible First Amendment claims with respect to many of Mr. Alexander's statements brought into question in recent weeks, providing legal advice to the Council on which statements should probably not be considered a basis for removal. Additionally, in assessing these statements, Council attorneys advised that most likely, none of the statements in question to date amount to obscenity, fighting words, or true threats as those terms are legally defined. (If statements did meet these legal definitions, they would constitute unprotected speech.)

3.5. Possible Grounds for Removal

As the Committee sought to clarify from councilmembers the rationale for Mr. Alexander's potential removal from the Traffic Commission, two main lines of reasoning emerged. The first line of reasoning was clarified by Councilmember Rollo during Committee discussions, when Councilmember Rollo stated he believes Mr. Alexander's conduct amounts to "intimidation" and "harassment" of members of the public. The second line of reasoning identified by some councilmembers and members of the public amounts to bias or a lack of fairness in Mr. Alexander's work on the Traffic Commission.

Notably, the motion for removal on the table does not seem to reflect the second line of reasoning. If the motion is withdrawn and a new motion made, the councilmember making the motion should seek to clarify their rationale for removal and identify the conduct or statements that demonstrate legal cause.

Whichever rationale and conduct are identified, Councilmembers will need to determine if and how the conduct has diminished Mr. Alexander's ability or fitness to perform his duties on the Traffic Commission. In doing so, the Council should look to Bloomington Municipal Code 2.12.070, which defines these duties as follows:

> It shall be the duty of the commission, and to this end it shall have the authority within the limits of the funds at its disposal, to coordinate traffic activities, to carry on educational activities in traffic matters, to supervise the preparation and publication of traffic reports, to receive complaints having to do with traffic matters, and to recommend to the common council and to appropriate city officials ways and means for improving traffic conditions and the administration and enforcement of traffic regulations.

Additionally, legal guidance summarized above in section 2.1 identified several questions to help councilmembers determine whether there is sufficient cause for removal. Council attorneys also noted the Council may consider comments from Mr. Alexander regarding his service on the Traffic Commission (including comments made at the February 15, 2023 Council meeting) and other statements from Traffic Commission members, staff, or members of the public as they relate to Mr. Alexander's performance of his duties.

3.6. Precedential Value of Past Mayoral Action

A question raised by several members of the public sought to clarify whether the Mayor rescinding an appointment of a Parking Commission member in December 2020 was a precedent on which the Council could rely in considering Mr. Alexander's proposed removal. Council attorneys shared that City Legal sees the Mayor's action as a rescindment and not a removal subject to the cause requirements of local code. Specifically, the appointee had not yet been seated, he was not currently serving on the commission, and his term had not yet started and was not going to start for some time. These conditions are different from Mr. Alexander's situation.

4.0 Considerations for Future Action

The Committee identified several additional possibilities for future action that will leave the Council better situated to consider the appropriateness of appointee removals for cause. Bloomington Municipal Code 2.08.020(4) could be updated to include additional conduct that constitutes cause for removal. This section could also be updated to incorporate the procedural due process recommendations of this report, namely that all removals for cause (not only removals for absenteeism) follow the same process including notice to the appointee and an opportunity to respond in writing.

The Committee is also exploring the creation of a code of conduct for board and commission appointees and plans to coordinate with City Legal on next steps. The City's personnel manual may serve as a guide, and Bloomington Municipal Code could be updated to incorporate the code of conduct by reference, including establishing violation of the code as cause for removal.

The Committee also plans to explore the possibility of incorporating via code an intermediate level of rebuke that falls below outright removal. There may be several situations where the Council would find this appropriate, for instance where an appointee's violation of the code of conduct is ambiguous or where the Council disapproves of appointee conduct but does not support removal.

The Committee's consideration of possible forward-looking changes is ongoing, and any recommendations are beyond the scope of this report. The Committee plans to take up board and commission reform efforts more broadly this year, and these types of changes may be incorporated into that body of work.

/s/Matt Flaherty_____
Matt Flaherty, At-Large Representative (Chair)

/s/Isabel Piedmont-Smith_____
Isabel Piedmont-Smith, District V Representative

/s/Sue Sgambelluri_____
Sue Sgambelluri, District II Representative