In the Council Chambers of the Showers City Hall on Wednesday, March 5, 2014 at 7:30 pm with Council President Darryl Neher presiding over a Regular Session of the Common Council.

COMMON COUNCIL
REGULAR SESSION
March 5, 2014

Roll Call: Ruff, Sturbaum, Sandberg, Granger, Neher, Mayer, Rollo, Volan, Spechler
Absent: none

ROLL CALL

Council President Neher gave the Agenda Summation

AGENDA SUMMATION

The minutes for the Regular Sessions of January 15, 2014 and February 5, 2014 were approved by a voice vote.

APPROVAL OF MINUTES

REPORTS

- COUNCIL MEMBERS

Andy Ruff noted that our community's primary transportation link, State Route 37 north to Indianapolis, would become a privatized highway as a result of a deal worth $800,000,000 over 35 years. He said that this hadn't been clear in the news media, but wanted people to know that the road would be built, operated and maintained by a multinational European corporation, not the state of Indiana and not the Federal Highway Administration. He said snow plowing, removal of deer carcasses, pothole repair, signage, drainage, striping that was now done through the state would now be done by a private company. He questioned whether the privatization of this transportation link in and out of our community was a good idea. He added that this was a stealth privatization with no public input or awareness.

Ruff said that opponents had argued for years that annual gas tax revenue would not cover the expenses of building and maintaining the road, but the state argued that this could be paid for with traditional funding – annual allocations of revenue.

Ruff noted the long term lease of another public asset -- the toll road in northern Indiana. He said that the lease payments could have been used for anything but the initial funding for I-69.

He said the Indiana Finance Authority had voted earlier that day to approve this measure.

Neher announced that he would be holding a constituent meeting on March 8, 2014 in the McCloskey Room at 11:00 am and urged citizens to attend.

There were no reports from the Mayor or City offices at this meeting.

- The MAYOR AND CITY OFFICES
-

President Neher announced the formation of a Special Committee on Boards and Commissions which would be comprised of Council members Granger, Neher, Volan in addition to City Clerk Regina Moore and Deputy Clerk Sue Wanzer. The first meeting of the Special Committee was announced for March 12th at 6:15 pm in the Council Library.

- COUNCIL COMMITTEES

President Neher called for public comment.

- PUBLIC

Nathan Shipley from Morgan County said he worked for Energy Shield, an energy audit company from Indianapolis that guaranteed energy savings for buildings. He noted he would be contacting people in this area for audits.

Dave Schliebaum talked about homeless persons who stayed in an east side laundromat. He said he was concerned that some individuals were not interested in going to agencies for help and shelter. He provided the council with a list of suggested actions that might alleviate the situation.

Public Comment *(cont'd)*

George Brooks spoke on minimum wage issues and economic issues.

Glenn Carter announced the Ubuntu shelter group meeting. He said the group was working on a year round low barrier shelter for homeless that would extend the services of the Interfaith Winter Shelter. He said it was unrealistic to expect people to cure their own mental illnesses and noted that some people die from exposure to the elements. He said that to stop drinking without help is life threatening and could cause seizures.

Kay Bull played the guitar and sang a parody to "Good Time Charlie's Got the Blues" entitled: "Old Bloomington Has Got the Blues"

APPOINTMENTS TO BOARDS AND COMMISSIONS

There were no appointments to Boards or Commissions at this meeting.

LEGISLATION FOR SECOND READING AND RESOLUTIONS

Resolution 14-03 To Initiate a Proposal to Amend the Text of the Unified Development Ordinance, Chapter 20 of the Bloomington Municipal Code, in Accordance with Indiana Code Sections 36-7-4-602(b) & 36-7-4-607(b) (Proposal to Protect the Character of the Courthouse Square and University Village Overlay Districts by Treating the Location or Expansion of a "Standardized Restaurants" in those Districts as a Conditional Use)

It was moved and seconded that Resolution 14-03 be introduced and read by title and synopsis. Clerk Moore read the legislation and synopsis, noting that there was no Do Pass recommendation on this item.
It was moved and seconded that Resolution 14-03 be adopted.

Tom Micuda, Planning Director, and Patty Mulvihill, Assistant City Attorney gave an overview of the resolution.
Mulvihill said that although changes in Title 20 would usually start with the Plan Commission, state law also allowed zoning changes to be initiated by the council. She said this resolution asked the Plan Commission to begin the process of preparing an ordinance that would change the zoning law. She said the Plan Commission would then certify the proposal with a favorable, unfavorable or no recommendation to the council, which would then be discussed and possibly adopted as an ordinance. She noted that would include at least two public hearings in addition to the public process in the Plan Commission.

Micuda showed slides that defined standardized restaurants and showed the proposed areas affected with maps of the overlays themselves, with relation to the downtown zoning districts and with relation to the entire city. He explained the history of the city's attention to policies and activities with regard to these overlays which recognized the areas as unique resources worthy of protection and continued vigilance.
Micuda talked about the timing of the issue and said that there were several properties that would be developed very soon that would have an effect on these overlays. He noted that the proposal was not a ban, did not address retail stores, and affected only two of the six overlays -- a small percentage of the city.
Micuda discussed the concept of Conditional Use Process, the difference from Permitted Use, Conditional Use Criteria and the community discussion that would take place at the Board of Zoning Appeals with each decision being unique to the particular situation.
Micuda outlined the specific criteria proposed in the ordinance as contribution to appropriate balance of businesses in the area, visual appearance in the particular surroundings, and the concentration of standardized restaurants within the area.
Micuda noted that this was just the beginning of the process of conditional use, that it covered a limited area of the city that had a historic significance and was worth protecting, that this was a case of balancing and monitoring, and that the decisions would take place on a case by case basis.

Volan asked for an overview of what documents would be produced and what actions would happen from this point on.
Micuda said that if the resolution was passed by the council, the Plan Commission would discuss the need for an ordinance, the scope of the

affected area, applicable definitions, the appropriateness of the conditional use process (rather than a prohibition or no process at all), and any standards for evaluation of conditional uses. He said the discussion, decisions or recommendations would then come to the council for further action.

Volan asked what the status of the language was, who was writing it and when it would be made public. Micuda said that draft language would be submitted to the Plan Commission for their March 10th meeting, the first discussion of the issue.

Spechler asked about the legality of the approach to conditional zoning. He asked Mulvihill to respond to statements made by a professor at the Mauer School of Law. Spechler would not identify the person, but said he wrote:

> *"I found the Urban Lawyer article you referred to and skimmed it. I'm unsure why Patty thinks it supports enacting the ordinance. The only similar case to be heard in the federal courts (cases in state courts other than Indiana are irrelevant) struck down the ordinance as unconstitutional. The only similar case to be heard in federal court struck down the ordinance as unconstitutional."*

Spechler said the legality issue should be dealt with.

Mulvihill noted that Council Attorney/Administrator Dan Sherman provided the article to the council. She said that there were two cases that were heard, one had a problem with the ordinance and one didn't. She said there were multiple levels of courts under the Supreme Court, and she added that this issue had never been litigated in the 7th Circuit, the Bloomington jurisdiction. She said in reviewing case law, the legal department felt there was a valid legal argument that our ordinance would be constitutional and would pass scrutiny.

Neher asked staff to address the use of restaurants versus general retail establishments. Micuda said restaurants were more of a specific destination rather than a retail point that would distribute patrons. He said that restaurants presented the heaviest activity point.

Neher asked about the area to be regulated and if the evaluations were being made for a single overlay or the combination of both overlays together. Micuda said there was not an automatic answer and that in some cases the decision might be made with regards to a one or two block area or a corridor in addition to the overlay as a whole.
Neher asked about this being a conservative approach, and asked about other communities. Micuda said communities' approaches ranged from fast food restaurants, to a combination of retail and restaurant, but most were in historic or other areas that needed to be protected. Mulvihill said that the staff found 22 ordinances in the US that dealt with this issue.

Sturbaum asked if Micuda would consider adding information from the Preservation Plan that would cite the uniqueness of the areas in the ordinance. Micuda said it could be considered.

Volan asked if there was an ordinance written at this point. Mulvihill said there was an uncirculated draft of the ordinance. Volan reiterated that a resolution did not require two hearings, and added that that point was often overlooked. Volan asked if the Plan Commission would send the matter back to the council as an Ordinance (that would have two readings and hearings). Sherman said ordinances typically included two hearings over two meetings. Volan asked if this matter would come back before April. Neher said the schedule for upcoming legislation had not been determined at this point.

Rollo asked if the Plan Commission would take more than one hearing. Micuda said that the matter was up to the Plan Commission.

Spechler asked if the phrase "avoiding overconcentration of standardized restaurants in the regulated area" would discriminate against standardized restaurants in favor of local restaurants. Mulvihill noted that there were local standardized restaurants. Spechler asked if it discriminated against standardized restaurants and for non-standardized restaurants. Mulvihill said she wouldn't use the word "discriminate." She said it set a higher level of scrutiny for standardized restaurants.

Public comment brought the following statements:
Liz Irwin from the Greater Bloomington Chamber of Commerce spoke on behalf of the members who could not make the meeting. She said the members were asking if there was an actual problem or a specific threat that set this legislation in motion. She asked why the threat hadn't been communicated. She said that this was not a new issue, and that vacant properties themselves were not a threat. She asked why this resolution was being pushed for a vote without what she called proper time for a response and input.

She said the legislation sought a solution to a problem that did not exist. She said it placed additional controls on natural market fluctuations and that unnecessary restrictions on business would cause uncertainty and would detract from the appeal of doing business in Bloomington. She urged the council to vote against the resolution, to take a step back from the process and to appreciate the burdens already placed on business -- parking changes, panhandling, cleanliness, and criminal trespassing. She asked the council not to vote against their neighbors and family members.

Scott Tibbs, city resident, spoke in support of property rights and the free market. He said he had serious concerns about the ban, noting that despite the conservative nature of the legislation, it was, indeed, a ban. He said it was not the role of government to decide for private property owners what they should have on their property, or to decide what consumers should choose to patronize. He said legal or not, the proposal violated the spirit of the Federal and Indiana State Constitutions that made it clear one class of people should not be favored over another. He added that there was no problem on Kirkwood in that Taco Bell, Dunkin' Donuts and McDonalds all failed. He called this legislation an overly aggressive intrusion into the private market.

Tom Allman said the market should decide what restaurants would be in the downtown, not the City of Bloomington. He said the city had no authority to tell people what to eat and asked that the council put this to rest.

Dave Kamen, President of Bryan Rentals, noted he appreciated previous help from the Planning Department. He said he had rebuilt some of the historic buildings on Restaurant Row. He said the issue was on a 'fast track' and caught people by surprise. He said the legislation was not posted, there was no link to the legislation on the planning website and that he had to come to city hall in person to obtain a copy of it. He said that this legislation was improper use of authority; it singled out restaurants and bars, and was discriminatory. He said the city should take a step back. He asked who had the training to determine the right percentage of standardized restaurants to outguess market demand. He said he owned seven buildings in the overlay areas, and debated the notion of it being a small area. He said the proposal harmed local franchise holders that lived in the community. He asked if there would be remuneration for property owners who would be damaged by this "condemnation" and asked who would determine the damages. He said he would like to have the draft copy of the ordinance that would be considered by the Plan Commission on March 10th so that people could

understand the issue. He asked that the process be slowed so the community could get it right.

George Brooks said he agreed with the spirit of the proposal. He added that care needed to be taken with wording so that it didn't target specific individuals. He said homogenized culture was not a desire, but that players were the ones with the most money in the market economy. He said that most corporate chains were not franchised, but corporately owned with decisions made in far away places. He asked the council to read *The McDonaldization of Society* to see this phenomenon. He added that he trusted the practice of democracy, but not in the hands of fewer and fewer individuals.

Dave Harstad said he was a local real estate broker who represented several businesses in the overlay districts. He said he was speaking for future clients. He said he was in favor of the spirit of the proposal and said that the way our downtown looks and feels is important for tourism and other economic reasons. He said that market forces alone should not decide what businesses go where. He said the city should objectively study identifiable standards that create difficulty for the community such as trash, noise, parking, loading, or hours of operation rather than looking at the balance between a local and standardized restaurants.
He said having ad hoc uncertain standards for regulation would create real hardship for businesses. He said it was easier to have tough standards that are known rather than the unknown and uncertainty in leases. He added that this would contribute to an already difficult environment for restaurants. New regulations on grease traps had already caused vacancies to be advertised specifically "not for restaurants." He said things to work on to preserve the character of the downtown would be stricter sign and awning regulations, maintaining aesthetics, and the study of the impact of certain types of restaurants.

Scott Davidson with Old National Bank said that the ordinance was an unnecessary burden for clients of ONB who are property owners. He said the downtown had vacant storefronts, and this ordinance would increase the risk of vacancies and property structure decline. He said ONB property in the overlay area was on the market, and said an additional layer of complexity was a detriment in the value of their unique property. He said that the city should continue to give other downtown issues priority instead of focusing on a problem that didn't exist.

Eric Stolberg, President of WS Property Group and Chamber member said he was asked by the Chamber to address the council on this specific topic. He applauded Spechler's statements and said that some people believe that this proposal is a clever work-around for a ban. He said that the non-standardized restaurant owners don't and can't pay as much rent as a standardized restaurant. He said the latter had tremendous assets, a lot of value and generated high volume. He said he believed that it was better to have a mix of establishments and said the Chamber would be conducting a study that would show the number of each type of restaurant in the proposed area. He said the study would find that there were fewer standardized restaurants, and he said the Chamber would share the results with the council. He said the difference in rents paid had a significant impact on the value of the property, and would trickle down to assessments, taxes, and the ability to garner tax revenues. He said properties were valued on the income approach which was an indication of the value of the property. He said the issue was complicated but real. He said the proposal was a solution to solve a problem that is not really there, but appreciated the council's willingness to work with others on this issue.

Jim Murphy, President of CFC Properties, spoke of what he called a tight timeline on this issue. He said the council asked good questions of staff and he was glad to know that the issue was not completely finished.

He said the public had been nervous and discomforted by decisions that came from the city administration without complete input from the business community. He asked why this proposal was necessary and said his experience was that national chains would not come to the downtown because they required a certain amount of traffic, signage, store frontage, parking, access, location and population. He said that CFC wanted to see the community character preserved, but he did not believe that time and resources should be spent on this non-issue. Murphy said the city did not have a good track record on lawsuits, and said that Spechler's question was germane.

Council comments:
Sandberg said it was useful to hear community feedback, especially from the business community. She noted the task at hand was to move this discussion to the Plan Commission, and that it was just the beginning of the larger discussion. She said there didn't need to be a looming threat for a city to be proactive in making sure that there were guidelines to help create and preserve the culture, amenities and type of community that are valued as Bloomington. She again noted that this proposal would not be a ban and would not cover the entire city. She disagreed that the free market was always the best arbiter of community life and culture, noting that the residents and citizens determine that.

Granger said she agreed with Sandberg. She added the need for all to think about what our future city would look like. She said that there would not be an impact on existing businesses.

Spechler said he liked the spirit of the proposal, and that the character and appearance of the downtown should be discussed. He said he would vote to send this issue to the Plan Commission, but he was putting them 'on notice' that he would vote against any proposal because he thought that, absent a reassuring legal opinion, the city would be sued and would lose in court at tremendous expense to the city. He said his legal friends told him that losing a case like this, would incur a legal bill and compensation to pay of about six figures. He said the city could not afford that type of risk for a benefit that seemed to him to be marginal. He quoted a leading authority (unnamed) at the Maurer School of law from an email to Spechler:

> *"What we probably cannot do is impose different rules on national chain restaurants than we do on local ones. It infringes the commerce clause by discriminating against interstate business entities in favor of local ones and implicates both the legal protection clause and the state's equal privileges and immunities clause. To be fair, that doesn't mean a lawsuit would necessarily win."*

Spechler repeated that the city could not take this risk and that the benefit was somewhat marginal. He said he'd like to see the Plan Commission consider a reduced version of this that would allow Bloomington to continue to regulate external appearance of all restaurants in accordance with the historic and pleasant appearance of the overlay. He said that right was legally protected, but that this proposal would discriminate against the standardized chains and was absurd and unnecessary. He said he didn't want to argue with the benefits of such a proposal, but that surely it was a marginal benefit. He said that since Bloomington was a tourist economy, standardized restaurants were familiar to people, and we should not tell tourists not to patronize them. He said Bloomington should offer a full range of choices. He said it was a waste of time to consider this further unless he could be reassured by a very firm outside legal opinion that this would be okay. He said Mulvihill's statements did not assure him of this.

Volan stated that resolutions did not create law or bind anyone. He said this resolution would ask the members of the Plan Commission to address the issue. He said that zoning existed for a reason, allowed for the scrutiny of a business -- its value to the community, ownership, and the impact of circulation of money in the community from that business.

He said that the criticism of the council's 'fast track' timeline had a real basis and that he had continually criticized it himself. He said the council needed to rethink the way it dealt with legislation and the timing of discussions in order to not inconvenience the public. He cautioned the council members and public about sticking to an issue rather than making comments personal in any way.

He noted that the overlays were within his councilmanic district, and noted that local toil and sweat built up this area to make it attractive to locals and tourists. He said the discussion about the future of this area was worth having, and said he believed that the issue would have full vetting before the council and the Plan Commission. He said the resolution had the limited intent of allowing the conversation to take place. He said his support of this resolution did not mean he would support an ordinance that might follow.

Rollo said that this resolution was about initiating a proposal about regulating standardized restaurants, not a decision on the ordinance itself. He agreed that the administration and council wanted to protect these overlay areas, and that the vitality of the area was also important to the public. He said he wanted to safeguard against an ambiguity of process and capricious nature of permits. He noted his support for the resolution did not assure his support of an ordinance.

Ruff noted this was not a hearing on an ordinance, and the process for this issue was not on a fast track. He said that the public comments had brought attention to many good points that he planned to look into during the process. He reiterated that there would be more opportunities for public engagement in the issue. He said impact on property tax revenues, trends of increases in standardized businesses in the past few years, rental rates of standardized and non-standardized businesses, impact of vacancies in the overlay and the impact on other economic factors were all things he wanted to ponder.

He said that the statement about violating interstate commerce regulations bothered him because the proposal was written specifically to avoid such an issue; local standardized restaurants were treated the same as non-local standardized restaurants. He noted a statement about the proposal making things more difficult for certain restaurants, and said he didn't agree. He said the point was to give the community a more formal option for having input in creating the mix in the downtown that they desire and have built so far.

He thanked speakers for their thoughtful statements.

Mayer noted again that passing this resolution was setting a process in motion for the Plan Commission to consider amending the city's Unified Development Ordinance on March 10, 2014. He noted also the process had more than one opportunity for the public to make their views known. He said that to move this to the Plan Commission would allow the community discussion to take place.

Neher said the discussion on this larger issue was started in 2009 and then stopped. He said he was not surprised that it had been restarted, and the discussion would take place on the specific language of the ordinance. He said the comments about the worthiness of the discussion were appropriate as indicated by the broad statements made by many participants in the night's discussion. He said comments about taking the time to find answers were appropriate and that the process was structured to do just that.

Resolution 14-03 *(cont'd)*

He said the process did not need to start with the council but could have started with the Plan Commission. That would not have afforded the opportunity for the initial discussion and public statements made at the night's meeting. He noted a statement on maximizing property value and added that he felt a healthy local economy was desired by all. He said it did a disservice to this and previous councils to think that this was not at the forefront of their minds. He said that the council was totally invested in making Bloomington an attraction.

Resolution 14-03 received a roll call vote of Ayes: 8, Nays: 0, Abstain: 1 (Spechler)

LEGISLATION FOR FIRST READING

Ordinance 14-03

Ordinance 14-03 To Rezone a 6.96 Acre Property from Residential Core (RC) to a Planned Unit Development to be Known as the B-Line Neighborhood and Approve a Preliminary Plan and District Ordinance - Re: 901 W. Cottage Grove Avenue (Habitat for Humanity of Monroe County, Petitioner)

PUBLIC COMMENT

There was no public comment at this portion of the meeting.

COUNCIL SCHEDULE

Dan Sherman, Council Attorney/Administrator, noted that there was a Committee of the Whole meeting scheduled for March 12, 2014 that was not actually needed. It was moved and seconded to cancel that meeting. The motion was approved by a voice vote.

ADJOURNMENT

The meeting was adjourned at 9:52 pm.

APPROVE: ATTEST:

Darryl Neher, PRESIDENT
Bloomington Common Council

Regina Moore, CLERK
City of Bloomington