

Birmingham City Commission Minutes
December 13, 2021
7:30 p.m.
Municipal Building, 151 Martin
Vimeo Link: <https://vimeo.com/653939970>

I. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Therese Longe, Mayor, opened the meeting with the Pledge of Allegiance.

II. ROLL CALL

Alexandria Bingham, City Clerk, called the roll.

Present: Mayor Longe
Mayor Pro Tem Boutros
Commissioner Baller
Commissioner Haig
Commissioner Host
Commissioner McLain
Commissioner Schafer

Absent: None

Administration: City Manager Markus, City Clerk Bingham, Senior Planner Cowan, Assistant City Manager Ecker, Finance Director Gerber, City Attorney Kucharek, Assistant City Engineer Zielinski

III. PROCLAMATIONS, CONGRATULATORY RESOLUTIONS, AWARDS, APPOINTMENTS, RESIGNATIONS AND CONFIRMATIONS, ADMINISTRATION OF OATHS, INTRODUCTION OF GUESTS AND ANNOUNCEMENTS.

- The Mayor shared the Commission's support for all those affected by the tornadoes that occurred across six states on December 10, 2021 and December 11, 2021.
- COVID-19 cases locally are the highest they have been since the beginning of the pandemic. Michigan and Oakland County continue to be at a high level of community transmission. As a result, the CDC recommends vaccinated and unvaccinated individuals wear a facemask indoors while in public. The City requires masks in City Hall for all employees, board and commission members, and the public. Please visit the CDC's website on how to safely celebrate the holidays and for more COVID-19 information.

IV. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA

V. CONSENT AGENDA

All items listed on the consent agenda are considered to be routine and will be enacted by one motion and approved by a roll call vote. There will be no separate discussion of the items unless a

commissioner or citizen so requests, in which event the item will be removed from the general order of business and considered under the last item of new business.

12-316-21 Consent Agenda

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Baller:
To approve the Consent Agenda.

ROLL CALL VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Baller
Commissioner McLain
Commissioner Schafer
Commissioner Host
Mayor Longe
Commissioner Haig

Nays, None

- Minutes for the December 6, 2021 workshop and regular meeting will be included in the January 10, 2022 meeting consent agenda for approval.
- A. Resolution to approve the warrant list, including Automated Clearing House payments, dated December 8, 2021, in the amount of \$578,072.41.
- B. Resolution to set a public hearing date of January 24, 2022 to consider updates to Birmingham's Corridor Improvement Authority Development and TIF Plan.
- C. Resolution to authorize the City Clerk to complete the Local Government Approval Notice at the request of Sushi Japan, Inc. approving the liquor license request of Sushi Japan, Inc. requesting a Redevelopment Quota Class C and SDM liquor license to be issued pursuant to MCL 436.1521 a(1)(b) with Sunday Sales (AM/PM) located at 176 S Old Woodward, Birmingham, Oakland County, MI 48009.
- D. Resolution to allow the IT department to purchase the renewal of 9 licenses of Adobe Creative Cloud from CDWG for a total purchase price of \$8,443.26 using funds available in the IT computer software account 636-228.000-742.0000.
- E. Resolution to release one grave in section B, row 2-A, for the family in an "at need" situation to purchase another plot adjacent to their existing family plots.

VI. UNFINISHED BUSINESS

12-317-21 Public Hearing – Wall Art – Ordinance Amendment

The Mayor ~~opened the public hearing at 7:35 p.m.~~ continued the public hearing from the December 6, 2021 meeting.¹

SP Cowan summarized the item.

¹ As amended at the January 10, 2022 meeting.

Seeing no public comment, the Mayor closed the public hearing at 7:37 p.m.

In reply to Commission comment, SP Cowan confirmed:

- Proposed wall art on private property would be reviewed by the Public Arts Board (PAB) and the Design Review Board (DRB) but not by the Commission;
- Proposed art on public property would be reviewed by the PAB and the Commission;

CM Markus advised the Commission against getting involved in the review process for wall art on private properties. In reply to a comment by Commissioner Baller, CM Markus noted that the authority to decide on design issues on private properties was ceded to the DRB years ago. CM Markus stated the Commission does not have enough time to review all the design issues, including wall art, that come before the DRB.

CA Kucharek concurred with CM Markus.

Mayor Longe noted that the matter of potentially objectionable material was considered as part of devising the proposed wall art policy.

Both CM Markus and Mayor Longe noted that not every resident would have to be in favor of a proposed wall art piece in order for it to be approved or worthwhile.

CM Markus noted that art should engender discourse.

Mayor Longe noted that just like the public would not prevent a building owner from using a specific awning striping, for example, the public would not prevent a building owner from installing wall art on the side or the rear of their building. She noted that power would rest with the DRB, and that the DRB has tended to be conservative in their design decisions.

Commissioner Haig recommended that the lighting of the wall art at night be considered as part of wall art reviews.

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Host:
To adopt an ordinance to amend Article 7, Section 7.41-7.46 – Processes, Permits, and Fees & Article 9, Section 9.02 Definitions of the Zoning Ordinance to create a wall art definition and review process.

Mayor Pro Tem Boutros commended all involved in creating the wall art definition and review process.

VOICE VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Host
Mayor Longe
Commissioner Haig
Commissioner Baller
Commissioner McLain
Commissioner Schafer

Nays, None

12-318-21 Public Hearing – 203 Pierce Street – Toast – Special Land Use Permit Amendment, Final Site Plan and Design Review

The Mayor ~~opened the public hearing at 7:35 p.m.~~ continued the public hearing from the December 6, 2021 meeting.²

SP Cowan introduced the item.

Kelly Allen, attorney, spoke on behalf of the owner of Toast.

Seeing no public comment, the Mayor closed the public hearing at 7:56 p.m.

CM Markus noted that if the Special Land Use Permit (SLUP) amendment were granted, Toast would still activate the street during the morning and early afternoon, whereas many other operators activate the street only in the evening.

CM Markus also said it might be worth encouraging operators to enter into leases or agreements to share their outdoor dining spaces with nearby operators if they are not using the spaces for parts of the day. He said that could help keep streets activated consistently throughout the day. He said that could be stipulated as part of the licensing process.

Commissioner Baller noted that those outdoor dining spaces could possibly be used for purposes other than dining.

Mayor Pro Tem Boutros stated that some prior Commissioners wanted Toast to remain open for evening hours in order to meet the requirements of the SLUP, to maintain the activation of the street, and to meet the requirements of the ordinance. He explained that requiring every bistro to be open all day may not be appropriate, but that he did not want to set a negative precedent if Toast were permitted to only be open for breakfast and lunch.

Mayor Longe noted the Commission was able to handle a similar situation with the required nuance in the case of Whistle Stop, and expressed her confidence the Commission could do the same again if desired.

Commissioner Baller noted that while 'activating the street' is often described by Commissioners and board members as the foundational reason for creating the bistro ordinance, the ordinance does not actually mention activation of the street. He explained the original goal of said ordinance was to create smaller restaurants and to create a more diverse mix of restaurants. He explained that was important since discussions regarding bistros frequently focus on whether a given bistro will sufficiently 'activate the street' in order to comply with the ordinance, when in fact that was not the ordinance's purpose.

CM Markus confirmed Commissioner Baller's explanation of why the bistro ordinance was created.

Commissioner McLain expressed concern that Toast violated its SLUP in its decision to stop serving dinner without the concurrence of the Commission. She said that issue needed to be addressed.

Mayor Longe noted:

- Many bistros operate for seven or eight hours in the evenings, and Toast would operate for the same length of time, just in the mornings;
- There are three other bistros on the street that activate the street during dinner hours;
- Toast fills a niche in terms of morning and afternoon dining;
- No other bistros are required to be open for 16 hours per day; and,

² As amended at the January 10, 2022 meeting.

- Permitting Toast to be closed in the evenings could help free up parking in the area for the other restaurants that are open.

The Mayor continued that she was concerned about the size of Toast’s outdoor dining platform given that it would be vacant in the evening hours. She also noted Commissioner McLain’s comment about Toast’s violation of its SLUP. The Mayor said the Commission could choose to allow Toast to only be open for breakfast and lunch without setting a precedent, as was done for Whistle Stop. She asked Ms. Allen or the owner of Toast to reply to the concerns about the platform.

Ms. Allen said Regan Bloom, the owner of Toast, would consider potentially entering into an agreement with another operator for the use of Toast’s platform when Toast is closed.

CA Kucharek stated she was not concerned that modifying Toast’s SLUP in this case would cause some potential harm to the City in the future. She noted that each SLUP is created based on an establishment’s specific circumstances.

In reply to Commissioner Schafer, SP Cowan stated that Toast was one of the only establishments that had hours of operation specified in their SLUP agreement.

Commissioner Host noted Toast was having difficulties maintaining its evening hours prior to the Covid-19 pandemic, that it tried to maintain its evening hours in earnest and was not able to, and that there is already activation on the street from other establishments. He said he did not believe Toast should be forced to maintain its evening hours.

MOTION: Motion by Commissioner Host, seconded by Commissioner Baller:
To approve the Special Land Use Permit Amendment, Final Site Plan and Design Review application for 203 Pierce Street – Toast – to amend the hours of operation.

Commissioner Schafer stated that an amendment to Toast’s hours should not be taken as a general precedent for other bistros, since each bistro is granted a SLUP based on its particular circumstances.

Mayor Pro Tem Boutros requested that Toast try and find a use for its platform during summer evenings.

The Mayor said that request would be more appropriate during a future conversation.

VOICE VOTE: Ayes, Mayor Pro Tem Boutros
 Commissioner Host
 Mayor Longe
 Commissioner Haig
 Commissioner Baller
 Commissioner Schafer

Nays, Commissioner McLain

VII. NEW BUSINESS

12-319-21 48th District Court FY 2022 Budget

FD Gerber and CM Markus introduced the item.

CA Kucharek clarified that Bloomfield Hills voted in October 2021 for their participation in the Interlocal Agreement to end December 31, 2021.

CM Markus stated he and CA Kucharek did not believe that Bloomfield Hills met the intent to opt-out requirements of the Interlocal Agreement and explained that conversation was ongoing between himself and Bloomfield Hills' City attorney.

Patrick Dunn, Court Administrator, presented the item. In reply to Commission and City Manager inquiry, Mr. Dunn explained:

- The insurance costs went up because an addition and a generator were added to the building;
- The Court has cut costs during the Covid-19 pandemic by not undertaking any capital improvements, pursuing grant money, and leaving unfilled positions open;
- He could add more detail to the page entitled "Expenses, Reductions, and Court Improvements" regarding the 'significant changes' referenced;
- Bloomfield Township, which is the landlord of the Court building, would be responsible for replacing the building's HVAC system, roof, walls, and a few other elements, according to the lease;
- He has been pressing Bloomfield Township to make the required repairs to the Court building; and,
- The cost of the lease increases every five years according to an escalator in the lease.

Commissioner Baller if the Court or the City had ever evaluated how the Court's revenue would be divided if it were done according to fines assessed rather than case load.

CM Markus replied that any benefits of doing so would be offset by the costs of doing so.

Commissioner Haig asked what the funds for the equipment and capital expenses are being used for if many aspects of the building still need replacing.

CM Markus noted the City is not a party to the lease that discusses some of these issues. He said the City could be better informed about expenditures, budgeting and operations, however, if the former quarterly meetings between the Court Administrator, Chief Judge and City resumed. He recommended the reinstatement of those meetings be pursued by the City. CM Markus said he would also like the opportunity to review the Court's audits moving forward.

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Schafer:
To approve the 48th District Court budget for fiscal year 2022 as submitted.

Mayor Pro Tem Boutros spoke in favor of reinstating quarterly meetings between the Court Administrator, Chief Judge and City.

ROLL CALL VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Schafer
Commissioner McLain
Commissioner Host
Mayor Longe
Commissioner Haig
Commissioner Baller

Nays, None

12-320-21 48th District Court Interlocal Agreement for the Expenses and

Maintenance of the 48th District Court

CA Kucharek and CM Markus presented the item.

CA Kucharek explained that the language of the Interlocal Agreement (Agreement) was changed earlier on December 13, 2021. The Agreement now clarifies that a District Funding Unit choosing to opt out must notify the other District Funding Units in January of a calendar year, and said District Funding Unit would remain in full effect of obligation through the conclusion of that calendar year. She said that change was made to remove the ambiguity that was in the original agreement.

Mayor Longe asked who would pay for the Court costs if Birmingham were to opt out of the Agreement.

CM Markus said that if Birmingham opted out, two-thirds of the revenue Birmingham creates would go to the jurisdiction where the Court is located. He noted that under the current Agreement, the costs are apportioned differently. He stated that the remaining funding units would be responsible for cover the losses.

Commissioner Baller said he was likely in favor of opting out during the present meeting. He said he was comfortable relying on the default method of funding the Court rather than the current terms of the Agreement since Birmingham was experiencing financial losses under the current terms. He suggested that Bloomfield Township (the Township) would likely make appropriate changes to the operation of the Court if Birmingham decides to opt out, and would then potentially come back to Birmingham to propose another Agreement once those changes are made.

CM Markus and CA Kucharek cautioned against deciding to opt out at the present meeting. CM Markus advised that giving the intent to opt out was an option worth considering in January 2022. He stated he would bring that option before the Commission in January 2022. CA Kucharek said that if the Commission decided to opt out at the present meeting, it would be unlikely that the City could re-enter into an Agreement with the other entities of the Agreement in the future.

Mayor Longe noted Birmingham also needs to maintain relationships with the other communities involved on other issues.

CA Kucharek notified the Commission that the Township passed the Agreement at its concurrent December 13, 2021 meeting.

Commissioner Haig concurred with Commissioner Baller's point that the Township might make more changes to the operations of the Court if Birmingham opts out. Commissioner Haig said he was unpersuaded by the Court Administrator's statement that cost saving measures have been adequately implemented since all the costs of running the Court increased.

The Commission concurred with CM Markus' recommendation that the agreement should use the 2020 audit year for the purpose of estimating the allocations for the 2022 budget.

Mayor Longe stated that using the 2019 audit year to create the estimate would require Birmingham to float the Court more working capital.

CM Markus confirmed that to be the case.

Commissioner Baller requested that Staff listen to the Township’s discussion of the Agreement at its concurrent December 13, 2021 meeting.

Commissioner Host thanked CM Markus and CA Kucharek for their approach to this item.

Commissioner Baller concurred.

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Schafer:
To accept the Agreement between the City of Birmingham, the Charter Township of Bloomfield and the Charter Township of West Bloomfield to be the three (3) District Court Funding Units for the 48th District Court, and further authorize Thomas M. Markus as the City Manager to sign the Agreement.

Commissioner Baller said he was voting to support this motion contingent on the Commission considering the possibility of offering its intent to opt out in January 2022.

CM Markus confirmed he would return the matter for the Commission’s consideration in January 2022.

ROLL CALL VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Schafer
Commissioner McLain
Commissioner Host
Mayor Longe
Commissioner Haig
Commissioner Baller

Nays, No

12-321-21 2022 Annual Review of Fee Schedule

CC Bingham presented the item.

Mayor Longe drew attention to the fact that legally the fees must be reflective of actual costs.

CA Kucharek confirmed.

CM Markus explained that since the City annually ensures that the fees cover the costs of services rendered, taxpayers do not have to subsidize these services via their property taxes.

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Baller:
To amend the 2022 Schedule of Fees, Charges, Bonds and Insurance, in the Community Development Department, Department of Public Services, Engineering Department, and Fire Department as stated in this report, and to adopt the revised Public Records Policy.

ROLL CALL VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Baller
Commissioner Schafer
Commissioner McLain
Commissioner Host
Mayor Longe
Commissioner Haig

Nays, No

12-322-21 Commissioners Attendance at Various Advisory Boards and Committees

CA Kucharek and CM Markus presented the item.

It was explained that if a Commissioner were a petitioner in front of a board or committee, said Commissioner would seek approval from the Commission and may want to consider securing a representative for the presentation of that petition.

Commissioner Haig asked how Commissioners could ask questions of boards and committees.

CM Markus said he would seek answers to questions he receives from Commissioners, and added that Commissioners should be careful to let boards, committees, and Staff undertake the work they were appointed and hired to do. He noted that many of the appointees are experts in their fields, and that Commissioners should have patience with the boards' and committees' processes of creating advisory opinions that will ultimately be offered to the Commission.

Mayor Longe stated she had an interest in certain board topics, but that she knew the most appropriate approach to her interest was to wait until the item was before the Commission. She said Commissioner participation in board and committee meetings can sway outcomes, or imply that the Commission does not trust its appointed board and committee members to do their work. She noted that implication could have the effect of demoralizing board and committee members.

It was noted that Commissioners review every advisory opinion from boards or committees and have the opportunity to ask as many questions as needed during their deliberations.

Mayor Longe, Mayor Pro Tem Boutros and Commissioners McLain and Schafer agreed that creating and enacting this kind of policy was appropriate.

Commissioner Baller noted that enacting this sort of policy would protect boards and committees from accusations of biased decisions stemming from a Commissioner's presence at a meeting.

It was noted by the Mayor and the City Attorney that Commissioners are partially restricted in what they can do relative to what non-elected residents can do, and that is a function of the responsibility they have to the community.

Commissioner Host said he was potentially interested in attending board and committee meetings to show support for the boards and committees.

The Mayor said it could not be guaranteed that a Commissioner's attendance would be interpreted as supportive. She said that if Commissioners were seeking to show support for boards and committees the Commission could discuss appropriate ways of doing that.

The Commission discussed whether it was appropriate for any one Commissioner to speak with any one board or committee member.

Mayor Longe said it seemed inappropriate according to the intent of the proposed policy.

CA Kucharek concurred with the Mayor and said she would advise against it. She noted that topics for further discussion could be raised during 'Commission Items for Future Discussion', and that if support is gained from the other Commissioners those topics could be added to a future Commission agenda.

The Mayor noted that workshop topics may be another appropriate avenue for raising topics requiring more in-depth discussion.

MOTION: Motion by Commissioner Baller, seconded by Commissioner Schafer:
To adopt a policy stating that Commissioners will not attend various advisory board and committee meetings.

Commissioner Host said he would vote against the motion because he did not believe it was in the best interest of the people the Commissioners work for.

VOICE VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Baller
Commissioner Schafer
Commissioner McLain
Mayor Longe

Nays, Commissioner Haig
Commissioner Host

12-323-21 National Lawsuit Regarding Opioid Manufacturers and Deliverers

MOTION: Motion by Commissioner Host, seconded by Mayor Pro Tem Boutros:
To direct the City Manager to sign the Settlement Agreement on behalf of the City, which will give the City of Birmingham the opportunity to receive monies from the National Opioid Settlement Agreement.

CA Kucharek said that if there insufficient participation from the 'effected' municipalities, this settlement will not proceed. If there is sufficient participation, then Birmingham would be looking at an approximate settlement of \$181,000 to be paid over 18 years.

In reply to Commissioner Baller, CM Markus said he would want to use the money to support recovery in individuals with substance use disorders. He confirmed that if the funds are received then allocation of the funds would be a matter for Commission review.

ROLL CALL VOTE: Ayes, Commissioner Host
Mayor Pro Tem Boutros
Commissioner Baller
Commissioner Schafer
Commissioner McLain
Mayor Longe
Commissioner Haig

Nays, None

12-324-21 Setting Public Hearing Dates for Proposed Sidewalk Streetscape Assessment Maple Road Reconstruction Project

ACE Zielinski summarized the item.

MOTION: Motion by Mayor Pro Tem Boutros, seconded by Commissioner Baller:
To set the Public Hearing of Necessity for the construction of sidewalk and streetscape improvements adjacent to all properties within the project area on Maple Road, between Chester Street and Pierce Street, and between Old Woodward Avenue and Woodward Avenue on Monday, January 24, 2022 at 7:30 p.m. for the purpose of conducting;
and,
If necessity is determined on January 24, 2022, to meet on Monday, February 14, 2022 at 7:30 p.m. for the purpose of conducting the Public Hearing to Confirm the Assessment Roll for the construction of sidewalk and streetscape improvements adjacent to all properties within project area on Maple Road, between Chester Street and Pierce Street, and between Old Woodward Avenue and Woodward Avenue.

ROLL CALL VOTE: Ayes, Mayor Pro Tem Boutros
Commissioner Baller
Commissioner Host
Commissioner Schafer
Mayor Longe
Commissioner Haig

Nays, None

Absent,
Commissioner McLain

Commission discussion on items from prior meeting

Commission Items for Future Discussion. A motion is required to bring up the item for future discussion at the next reasonable agenda, no discussion on the topic will happen tonight.

VIII. REMOVED FROM CONSENT AGENDA

IX. COMMUNICATIONS

X. REPORTS

- A. Commissioner Reports
- B. Commissioner Comments

Commissioner Schafer said she wanted Commissioner McLain to be able to accept the invitation of the Cable Board to attend their December 15, 2021 meeting and receive a token of appreciation for her years of service to the Board.

CA Kucharek said that would be appropriate if the Commission voted to allow Commissioner McLain's attendance, and if the Cable Board put the item at the top of the agenda so Commissioner McLain could depart before any items of business are discussed.

MOTION: Motion by Commissioner Schafer, seconded by Commissioner Haig:
To allow Commissioner McLain to attend the Cable Board meeting on December 15, 2021 at 7:45 a.m. to accept a token of gratitude from the Board.

VOICE VOTE: Ayes, Commissioner Schafer
 Commissioner Haig
 Mayor Pro Tem Boutros
 Commissioner Baller
 Commissioner Host
 Mayor Longe
 Commissioner McLain

Nays, None

- C. Advisory Boards, Committees, Commissions' Reports and Agendas
- D. Legislation
- E. City Staff
 - 1. City Manager's Report
 - 2. Response to Andrew Haig Email
 - 3. Identifying Pending Litigation

CA Kucharek reviewed the topic. She stated that former Commissioner Sherman reached out to her about the need to add the information.

CM Markus and CA Kucharek said a motion should be made to add the information to the present meeting's minutes.

MOTION: Motion by Commissioner Haig, seconded by Commissioner Host:
To note that the Commission went into closed session at its December 6, 2021 meeting to discuss City of Birmingham v Daniel Forthoffer and Jola Forthoffer;
Oakland County Circuit Court Case No.: 2021-188981-CH
Hon. Victoria Valentine

AND

City of Birmingham v Anthony Beshouri and Paula Beshouri;
Oakland County Circuit Court Case No: Case No. 2021-188983-CH
Hon. Cheryl A. Matthews.

ROLL CALL VOTE: Ayes, Commissioner Schafer
 Commissioner Haig
 Commissioner Baller
 Commissioner Host
 Mayor Longe
 Commissioner McLain

Nays, None
Recused,
Mayor Pro Tem Boutros

INFORMATION ONLY

XI. ADJOURN

Mayor Longe adjourned the meeting at 11:15 p.m.

Alexandria D. Bingham

Alexandria Bingham, City Clerk
/le