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# MEMO

**TO:** Councilor David Berezniak

**FROM:** Kenneth A. Schatz, Esq., City Attorney *KAS*

**RE:** Complaint re March 12, 2009 Special City Council Meeting

**DATE:** March 26, 2009

I am responding to the following email that you sent to me on March 13, 2009:

"I am formalizing the complaint I expressed to you at last night's 3/12/09 "special" City Council meeting. As I stated to you, I was intimidated from participating in the debate of the issues after being informed that Council President Wright determined questions on points of order would be considered "disruptive" and further undefined "disruptions" would be dealt with by physical removal by the Burlington police. Under these threats my only recourse as an elected representative of our city with a responsibility to be present was to remain silent, thus depriving my constituents of their voice on the issues. In my mind this raises questions about all that occurred at last night's meeting after the recess. Your advice on this serious matter is very much appreciated."

By way of background, the City Council meeting on Monday, March 9, 2009 night ended without completion of the agenda, when a motion to suspend the rule regarding ending the meeting at 10:30 pm did not receive the required two-thirds vote. A Special City Council meeting was called by the Mayor for Thursday, March 12, 2009. That meeting began with several "points of order" and "points of information." When the calls for points of order continued after the President's ruling, interrupting another member who had the floor during the discussion of the proposed zoning change regarding downtown height, the President called for a recess.

When the City Council reconvened after the recess, uniformed Burlington police officers arrived and were standing at the back of Contois Auditorium. As agreed upon during the recess, a point of order was raised. I was asked to and did address the point of order. The President then denied the point of order and the City Council continued discussion on the motion related to the proposed zoning amendment. After the proposed zoning amendment was acted upon, the President was asked about the presence of police officers. The President informed the Council that if there were continued disruptions of the meeting, the people making the disruption would

be removed. There were no disruptions and sometime soon thereafter, the police officers left the room.

Later in the meeting, I was asked whether making a point of order would constitute a disruption. I informed the Council that in my opinion simply making a point of order by itself did not constitute a disruption warranting removal from the meeting. However, I clarified that it was the responsibility of the President of the City Council to preserve order. I also informed the Council that the appropriate way to challenge the ruling of the President on a point of order is to appeal that ruling by requesting a vote from the full Council.

In order to address your letter, we have reviewed the City Charter, the Rules and Regulations of the City Council (hereinafter "Rules"), Robert's Rules of Order 10<sup>th</sup> Edition (hereinafter "Robert's Rules") and applicable law. The City Charter specifically provides that the City Council shall elect one of its members to be President. City Charter Sec. 36. The Charter also provides that the City Council has the power to enact and enforce rules for itself. City Charter Sec. 48 (46). The City Council has enacted "Rules and Regulations of the City Council," found at Appendix B of the Burlington Code of Ordinances. The following City Council Rules are worth noting with respect to this matter:

- "The presiding officer of the City Council shall be styled the president..." Sec. 1
- "The purpose of City Council meetings is to conduct city business efficiently and effectively, while still allowing appropriate public input..." Sec. 1.A
- "The presiding officer shall preserve order and decorum and shall decide all parliamentary questions subject to appeal..." Sec. 6
- "No member shall make a motion or speak on any question until he has addressed and has been recognized by the chair..." Sec. 7
- "When a question is before the council, no motion shall be entertained but a point of order..." Sec. 8
- "The business of the Council shall be conducted in accordance with the recognized parliamentary rules as set forth in the current issue of Robert's Rules of Order..." Sec. 17

There is no doubt that it is the appropriate role of the President of the City Council to preserve order and decorum so that the City Council may conduct its business efficiently and effectively. Rules Sec. 1A and 6. "It is always the duty of the presiding officer to enforce the law or rules applicable to the body, keep order and follow the course of the proceedings." McQuillin's, 4 The Law of Municipal Corporations (3<sup>rd</sup> Ed. 2002), Sec. 13.21

When a point of order is denied by the President, the appropriate recourse is to appeal that decision to the full Council. Rules Sec. 6, Robert's Rules Sec. 24 at P. 247. The President's decision stands unless reversed by a majority of the Council. Robert's Rules, Sec. 24

at P. 250. It is not appropriate for a member to continue to make the same point of order that has been denied by the chair without an appeal, when another member has the floor. Robert's Rules, Sec. 24 at P. 247, Rules Sec. 7 and 8. Accordingly, in light of the continued calls for points of order when another member had the floor, it is our view that the President's call for a recess was an appropriate approach to preserve order and decorum and to find a way to return to conducting the City Council's business efficiently and effectively.

The President informed the Council that he asked for police officers to be in the room after the recess in case there was a need for their assistance to remove disruptive members. As discussed above, the police officers were not asked to nor did they take any action. But there is clear authority indicating that if there had been a substantial disruption of the meeting and an offending member had refused to desist, it would have been appropriate for the Council to decide to order the removal of a member and to ask police officers to implement that order if necessary.

An offending Council member may be removed from the room in extraordinary circumstances, i.e. in cases of obstinate or grave breaches of order by a member. Under Robert's Rules, the chair does not have the authority to impose such a penalty on his own, but the full Council does have that power. Robert's Rules, Sec. 61 at P. 627. Robert's Rules describes the process in such a circumstance, advising that the offending person should first be ordered to leave the meeting. If the person refuses to obey such an order, it is the chair's responsibility to take necessary measures to see that the order is enforced, which may include appointing a committee to escort the offender to the door or to ask the Police to remove the person. Robert's Rules, Sec. 61 at 629. See, State v. Dominic, 376 A2d, 124 (N.H. 1977) (Selectman who continued to interrupt another selectman and refused to come to order could be ordered to be removed from the room and when the selectman refused to leave, the chair could properly ask for the assistance of a police officer and that officer's order to step outside was a lawful order and defendant could be found guilty of disorderly conduct for failing to obey that order.)

Interestingly enough, the Vermont Supreme Court issued a decision on March 13, 2009 describing what would constitute disorderly conduct as related to a disruption of a public meeting. The court held that such conduct must amount to substantial impairment of the meeting where a person makes numerous and sustained efforts to disrupt the meeting after being asked to desist. State v. Colby, State v. Wardinski, 2009 Vt. 28 at p. 6.

We appreciate that there is disagreement about the appropriateness of the President's request for police presence in the room. However, in light of the authority discussed above, we believe that it is a judgment call of the President whether and when to ask for police presence. We do not see it as our role to second guess that judgment call. It is our view that had the President taken unilateral action to request that a member be removed that would have been error if such an action had occurred without approval by the full Council. But that did not happen.

In summary, we do not find the actions of the President at the Special City Council meeting on March 12, 2009 to be in violation of the City Charter, the City Council Rules, Robert's Rules of Order, or applicable law. Therefore, we find no basis to question the actions of the Council after the recess.

In light of all that occurred, it is our advice that the Council may want to promulgate a rule clarifying the process and sanctions to apply if there is a concern about breach of order in the future.

cc: City Council  
Mayor Bob Kiss

lb/c: KAS 2009/City Councilor David Berezniak - Complaint re March 12, 2009 Special City Council Meeting