

**CITY OF BIRMINGHAM  
BOARD OF ETHICS AGENDA  
OCTOBER 11, 2018 4:00 PM**

**151 MARTIN ST., BIRMINGHAM MI 48009  
CITY COMMISSION ROOM #205**

**I. CALL TO ORDER**

Temporary Chairperson Schrot

**II. ROLL CALL**

J. Cherilynn Mynsberge, City Clerk

**III. ELECTION OF CHAIRPERSON**

**IV. APPROVAL OF MINUTES**

A. Approval of minutes of October 2, 2018

**V. UNFINISHED BUSINESS**

**VI. NEW BUSINESS**

- A. Consideration of Advisory Opinion Draft
- 2018-003 Advisory Opinion: Leslie Pielack, Birmingham Museum Director

**VII. PUBLIC COMMENT**

**VIII. ADJOURN**

*NOTICE: Individuals requiring accommodations, such as mobility, visual, hearing, interpreter or other assistance, for effective participation in this meeting should contact the City Clerk's Office at (248) 530-1880 (voice), or (248) 644-5115 (TDD) at least one day in advance to request mobility, visual, hearing or other assistance.*

*Las personas que requieren alojamiento, tales como servicios de interpretación, la participación efectiva en esta reunión deben ponerse en contacto con la Oficina del Secretario Municipal al (248) 530-1880 por lo menos el día antes de la reunión pública. (Title VI of the Civil Rights Act of 1964).*

I, J. Cherilynn Mynsberge, the duly appointed City Clerk for the City of Birmingham, certify this meeting notice was posted at all four entrances into the Municipal Building, and to [www.bhamgov.org](http://www.bhamgov.org) on October 2, 2018.

  
\_\_\_\_\_  
J. Cherilynn Mynsberge

**Packets sent via email to:**  
Board Members  
Joe Valentine  
Tim Currier  
Leslie Pielack

## **AGENDA ITEM 4A**

### **APPROVAL OF MINUTES OF OCTOBER 2, 2018**

Minutes will be provided at the meeting.

# AGENDA ITEM 6A.1.

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION 2018-3**

**Question Presented**

Does it violate the Ethics Ordinance if the Friends of the Birmingham Museum, an independent, tax-exempt corporation that exists to support the City of Birmingham Museum, purchases books written by the Museum Director on her own time, re-sells the books at public talks given by the Museum Director and donates the profits from the book sales to the Museum?

**Answer**

No, if the Museum Director has met with the City Manager to assure the activity does not otherwise violate City policy and is careful not to promote private book sales as having any relationship to the City of Birmingham, the Museum or her position as Museum Director.

**Factual Background**

Ms. Leslie Pielack is employed by the City of Birmingham on a part time basis as Museum Director and has written a non-fiction book about the history of southeast Michigan.

Ms. Pielack wrote and researched this book on her own time and at her own expense. The book will be published by Arcadia Publishing/The History Press. The publisher will market the book to bookstores and museum gift shops as well as on line. Ms. Pielack is entitled to a small royalty through the publisher, unless she purchases the books herself, in which case she pays a discounted price.

The publisher and Ms. Pielack hope to schedule book events/author signing at bookstores and museum shops where the book will be sold. As author, Ms. Pielack, is entitled to purchase books for her own inventory to sell at personal book signing and events that she arranges to promote the book.

Additionally, in her role as Birmingham Museum Director she will occasionally give presentations on topics related to Birmingham's history as part of the Museum's outreach services. While not fee based, these events generate donations for the museum that range from \$50-\$150.00 per presentation.

The Friends of the Birmingham Museum is a 501(c)(3) non-profit corporation that conducts fund raising and educational activities to support the Birmingham Historical Museum and its mission. This group would like to purchase some of Ms. Pielack's books at their expense for sale during Ms. Pielack's outreach presentation. Ms. Pielack will purchase the books from her publisher at her discount for the sale by the Friends. The Friends propose to donate the book sale proceeds to the Museum. Ms. Pielack also plans to promote her book for her own account at non-museum related events. These events will not be promoted at the Museum or in a manner that links them to the City of Birmingham or her role as Museum Director.

### **Analysis**

ETHICS OPINION 2010-1 held that City Officials may participate in independent fund raising activities for the Museum if:

- (A) the activity is clearly promoted as a private activity, not sponsored by the City of Birmingham; and
- (B) the City Official meets with the City Manager to define the extent and methodology of any fund raising activities to assure they comply with City policy and follow the appropriate decisional process.

The Friends of the Birmingham Museum is an independent corporation not subject to the Ethics Ordinance, which regulates the behavior of City Officials. The Friends is not a City Official. It is neither elected nor appointed, nor does it serve in a position established by the City Charter or ordinance. As a part-time employee, Leslie Pielack is a City Official. Ordinance Section 2-322. She has cleared her activity with the City Manager and has agreed she will state that her book promotions are not City sponsored. Therefore, unless the particular facts of this proposal create a specific conflict of interest prohibited by the Ethics Ordinance, the sale of Ms. Pielack's book at a Museum outreach program by an independent entity which will donate the proceeds to the Museum is a permissible activity.

The Ethics Ordinance details two separate types of conflict of interest, general and specific. General conflicts of interest are described in Section 2-323 which lists 5 types of activities that might result in or create the appearance of a conflict of interest, such as using public employment for

private gain, giving or accepting preferential treatment, giving up independence of action, making a decision outside of official channels or affecting public confidence adversely. The proposed activity does not implicate any of these general concerns. The closest is 2-323(1), which prohibits using public employment for private gain. Here the proceeds of the sales go to the Museum. Nobody is compelled to purchase the books from the Friends or indeed, at all. Ms. Pielack does not receive the proceeds of any of the sales the Friends make.

Section 2-324 lists 8 very particular types of conflicts of interest that may arise and requires disclosure of these potential conflicts of interest. Several sub-sections merit consideration, but none constitute a conflict of interest under the Ethics Ordinance on the facts presented.

Section 2-324(b)(2)(a)(3) requires Ms. Pielack to disclose her interest in this matter to her supervisor and she has done so.

“Every official or employee of the City shall use personnel resources, property and funds [for public purposes] and not for personal gain or benefit.” 2-325(a)(3).

“No official or employee of the city shall engage in the business transaction in which he or she may profit because of his or her official position or authority.” 2-324(a)(5).

Ms. Pielack wrote the book on her own time and with publicly available resources. She wrote the book as a local historian, not as the Museum Director. She is not profiting from her official position. In fact, the Ethics Ordinance specifically allows part-time employees, like Ms. Pielack, to engage in private business:

“This section shall not prohibit a part-time elected or appointed city official from engaging in private employment or business on his or her own time as a private citizen and where city business is not involved, subject to his or her disclosing such private employment or business....” 2-324(a)(6)(2nd paragraph).

“No official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself or others, beyond that which is available to every other citizen.”  
2-324(a)(8).

Again, there is no conflict of interest under this section. It is hard to see what special privilege is involved here. The Friends of the Birmingham Museum is free to promote any book of local history, and doubtless would do so if it thought there was public demand.

Ms. Pielack indicated she usually receives a small royalty of the sales price from the publisher for each book sold. In this case Ms. Pielack is purchasing the books from the publisher for the Friends using her own discount and receives no royalty. The Friends may then sell Ms. Pielack’s book at one of the Museum outreach events. Section 2-324(a)(4) speaks directly to this situation:

“No...employee of the city shall....solicit...any...other thing of value for the benefit of any person or organization, other than the city, which tends to influence the manner in which the...employee performs his or her duties.”

The section goes on to except fees for speeches or published works. The proposed activity does not violate Section 2-324(a)(4) on at least two counts: it generates no fee for a published work and there is no indication that the arrangement will influence the manner in which Ms. Pielack performs her official duties.

### **Conclusion**

Ms. Pielack may speak at Museum outreach events at which the Friends sell her book for the benefit of the Museum and may promote such events without violating the Ethics Ordinance so long as she has discussed the proposal with the City Manager, clearly discloses that the book is a private work and not the product of the City of Birmingham nor is the City responsible for its content. Ms. Pielack may promote her book at non-Museum related events so long as

she does not state or imply that the City of Birmingham or the Museum is a sponsor of, interested in, or in any way involved with the preparation or sale of the book.

Ms. Pielack may sell her book at professional conferences and book signing arranged by her publisher so long as she is presented as the author of the book, and not the Director of the Birmingham Museum.

We congratulate Ms. Pielack on her book. And thank her for her generosity and commitment to the Birmingham Historical Museum. We wish her luck with this project.

Approved:

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John J. Schrot, Jr.  
Chairman

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James D. Robb  
Member

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Sophie Fierro-Share  
Member



# REQUEST FOR ADVISORY OPINION

## REQUEST FOR ADVISORY OPINION

Case No. \_\_\_\_\_  
(Assigned by clerk)

The Procedural Rules of the Board of Ethics allow a city official or employee, the City Commission, or another city commission, board or committee, as defined in the Code of Ethics ("the requesting party"), to request an advisory opinion as to whether the requesting party's conduct or anticipated conduct, or that of a city official, employee, commission, board or committee under the requesting party's authority, conforms to the Code of Ethics. The party whose conduct is sought to be reviewed, if it is someone other than the requesting party, is called the "subject party."

All advisory opinions will be communicated to the city commission and will be published on the city's website at [www.bhamgov.org](http://www.bhamgov.org).

Written requests are subject to disclosure under the Freedom of Information Act.

Name Leslie Pielack Phone Number (248) 530-1682  
Address Birmingham Museum, 556 W. Maple, Birmingham  
(Number, Street, City, State, Zip) MI 48009  
Position or Board (If Applicable) Museum Director, Birmingham  
Museum

- A. State each question upon which an opinion is desired. Attach additional sheets of paper if the space provided below is not sufficient.
- B. State all of the facts giving rise to each question presented.
- C. If available, provide all relevant statutory provisions, case law, prior opinions of the Ethics Board, and other authorities.

**NOTE:** Although the foregoing criteria are subject to exception when the circumstances warrant, a request which does not meet these criteria may be returned and the requestor asked to resubmit the request in an appropriate form.

**Please return requests to:** City Clerk's Office, City of Birmingham  
151 Martin, P.O. Box 3001, Birmingham, MI 48012

Revised 8/16/12

### FOR OFFICE USE ONLY

Accepted by \_\_\_\_\_ Date \_\_\_\_\_



Facts:

- I, Leslie Pielack, have been employed by the City of Birmingham on a part-time basis as museum director at the Birmingham Museum since 2010
- I also have maintained a part-time consulting business providing historic preservation and research services since 2005, located in Lake Orion and Oxford, Michigan, known as LKPielack Consulting, LLC
- I have authored various print and online articles and booklet publications relating to architectural and local history since 2003, published by various non-profit organizations or self-published
- I have been working on a non-fiction book since 2015 that relates to the history of southeast Michigan from Detroit to Saginaw, called *The Saginaw Trail: From Native American Path to Woodward Avenue*. It covers the general history of the region with selected vignettes of individual people and communities along the Saginaw Trail (Woodward). It will be published by Arcadia Publishing/The History Press the week of July 30, 2018.
- I researched and wrote the book on my personal time and at my personal expense, traveling to historical museums and archives throughout the region and utilizing online historic materials in the public domain. It is 192 pages with approximately 80 illustrations, and has 15 chapters. One of the chapters features some of the historic events and people of Birmingham's settlement period.
- The book will be marketed regionally to bookstores and museum gift shops as well as online. There is a small royalty percentage to which I am entitled on the sale of books through the publisher and bookstores and museums. Entities who wish to sell the book, such as booksellers and museum gift shops, purchase the book directly from the publisher.
- The publisher wishes to schedule book events/author signings at bookstores and museum shops where the book will be sold.
- As author, I am also entitled to purchase books for my own inventory to sell at personal book signings and events that promote the book or the topic. Some book events/author signings and presentations would be arranged by me directly.

Also:

- From time to time, as Birmingham Museum Director I give presentations on topics related to Birmingham's history. These presentations are part of my position and the museum's outreach services. They are not fee-based, but generate donations for the museum that range from \$50-150 per presentation.
- In addition, I participate in professional conferences in which I represent the city as Museum Director and promote the Birmingham Museum's mission.
- I also give presentations to colleagues or historical groups that are not part of my position and not for the benefit of the museum.
- The Friends of the Birmingham Museum is a 501c3 non-profit organization (a.k.a. the Birmingham Historical Society) that conducts fund-raising and educational activities to support the museum and its mission. The Friends, from time to time, have purchased books at their expense for sale in the Birmingham Museum gift shop. When sold, these books generate revenue for the museum.

1. I would like to appear in public in the Birmingham area as museum director of the Birmingham Museum to promote local history and the topic of my book, the Saginaw Trail/Woodward Avenue. I

would like to be able to sell books purchased by the Friends at these events, with all proceeds going to the Birmingham Museum, and I would like to be able to announce and promote that profits will be donated to the museum.

2. I would like to promote these Birmingham Museum-related events to the public through the press and also online media, including the museum's website and Facebook avenues. Non-museum-related events that would not result in sale proceeds going to the museum would not be listed or promoted at the museum or through any communications related to the museum or to the city, or through any activity undertaken by me in my role as museum director.

**Would the activities noted above in 1. and 2. be permissible within my obligations and employment with the City of Birmingham without creating a conflict of interest, and, would it be considered ethically appropriate to engage in these activities?**

Attached Previous Board of Ethics Advisory Opinion Decisions:

1. July 22, 2010; regarding whether the Birmingham Historical Museum and Park Board (now the Birmingham Museum Board) may engage in fund raising to fund certain Museum operations. Part of analysis and opinion relates to independent fundraising by Museum Board members for the benefit of the Birmingham Historical Society (Friends of the Birmingham Museum) and clarifies ethical practice in that activity. This opinion may bear upon the question in this request.

2. March 8, 2012; regarding conflict of interest standards relating to a question by the Mayor of the City of Birmingham regarding his business firm and a potential contract. In this opinion, the Ethics Board reviewed previous conflict of interest matters relating to positions with the City of Birmingham. The analysis in part reviews whether an official or employee derives monetary gain from his/her position, which would constitute a conflict of interest, and provides examples.

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION 2010-01**

**DECISION  
July 22, 2010**

**Question Presented**

May the Birmingham Historical Museum and Park Board, or its individual members, raise monies to fund certain Museum operations?

**Answer**

City of Birmingham Ordinance no. 62-31 (e) grants the Birmingham Historical Museum and Park Board the power to raise funds for certain purposes. The ordinance establishing the Birmingham Historical Museum and Park Board divides responsibility for operations between the Board and the City Administration. To avoid creating the appearance of making a decision outside of normal City channels in violation of the Ethics Ordinance Sec. 2-323 (4), the Ethics Board recommends that the Birmingham Historical Museum and Park Board meet with the City Manager to define the extent and methodology of any fund raising activities.

Individual Board members in their capacity as private citizens may participate in fund raising to support the Historical Museum with groups not part of city government, such as the Birmingham Historical Society, as long as they do not create the impression that the individual Board member is representing the City in this effort.

**Analysis and Discussion**

In its presentation to us, the Birmingham Historical Museum and Park Board was forthright that its purpose was to fully fund the museum director's position, which was reduced to part-time in next year's City budget. The Board understandably believes that a full-time director is critical to the success of its mission of fostering a greater understanding of the City of Birmingham's unique heritage. Sec. 62-31(a). This request for an advisory opinion brings into focus two separate problems: how far may a City board go in carrying out its mission and what must individual board members do if they wish to engage in private activity in support of what they perceive to be in the City's interests.

**May the Board Raise Money to Preserve an Employment Position on the Birmingham Historical Museum Staff?**

Yes. The ordinance which creates the Birmingham Historical Museum and Park Board contains a system of shared responsibility. The Board has the power to "operate" the museum and serves as "an advisory authority exercising control and management over this cultural resource." Sec. 62-31(d). It is empowered to "raise funds for the exercise of its powers and duties" [Sec. 62-31(e)], which specifically includes the operation of the museum. The Board is authorized to "expend such funds as may from time to time be appropriated to it by the city commission or

otherwise received by it for the purpose of carrying out" its powers and duties. Sec. 62-30.

The shared responsibility is most clear in relation to the museum's executive director. The executive director is a city employee, who is "appointed, removed and supervised by the city manager." Yet the museum director reports to the Board, carries out the duties the Board requires and attends all Board meetings. Sec. 62-32.

The Ethics Board has limited powers. We resolve complaints and issue advisory opinions regarding the Ethics Ordinance. We do not interpret potential conflicts or ambiguities in other ordinances, except as absolutely necessary to giving an opinion under the Ethics Ordinance; nor do we give opinions as to what conduct is permissible under other ordinances. We are not now concerned with the exact division of responsibility between the City Manager and the Birmingham Historical Museum and Park Board in the supervision of the museum's executive director. We are mindful, though, that one of the purposes of the Ethics Ordinance is to "make government decisions and policy in the proper governmental channels." Sec. 2-320. This public policy is reiterated in the Ethics Ordinance's requirement that all "City officials and employees avoid any action....which might result in or create the appearance of....making a City decision outside official channels." Sec. 2-323(IV). Additionally the Ethics Ordinance does not displace rights under the City's collective bargaining agreements. Sec. 2-323.

The fund raising that the Birmingham Historical Museum and Park Board is thinking of might easily come into conflict with the City's budgeting process, or its human relations policies or the City Manager's duties under the ordinance establishing the Board. In order to stay within proper governmental decision-making channels, the Ethics Board recommends that the Birmingham Historical Museum and Park Board meet with the City Manager to assure that any fund raising activities it undertakes comply with City policies and follow the appropriate decisional process. We are deciding only that the Birmingham Historical Museum and Park Board should not start a fund raising campaign to support its operations unless it has met with the City Manager to discuss the issue. Although we doubt it will be necessary, we reserve for a later time and the development of a more complete factual record, the question of whether, under the Ethics Ordinance, the Birmingham Historical Museum and Park Board may raise funds in a manner opposed by other City officials or boards.

## 2

### **May Individual Board Members Participate in Independent Fund Raising Such as For the Birmingham Historical Society?**

Yes, but with certain conditions. The Birmingham Historical Society is a separate, private organization and is not a body of the City of Birmingham. The Historical Society does, however, provide some funding to the city-owned Birmingham Historical Museum. We have previously issued advisory opinions about whether a City employee or board member may call attention to his or her City affiliation in private fund raising or political activity. Those opinions are instructive.

In Ethics Opinion 2003-04 we said that the Ethics Ordinance allows a City employee to disclose the fact and nature of his employment in campaign literature for a non-partisan political office. We placed importance on the public's rights to know one's qualifications, but we warned that: "caution

must be taken however when one's conduct gives the appearance as a 'City Official' that his or her opinion is that of the City itself or its Board(s)."

In Ethics Opinion 2009-02, we said that under the Ethics Ordinance a member of a City board may not, in private political activity unrelated to the Board's duties, identify himself as a City Board member. We further observed that identification as a Board member may be permissible under the Ethics Ordinance "if it is germane to his role as a City Official and if he states that it is his personal opinion and not that of the.....Board or the City."

In Ethics Opinion 2004-02, we held that a volunteer member of a City board may solicit funds in his personal capacity, even where the use of those funds is adverse to the City, so long as he does not hold himself out as raising those funds in his official City capacity.

This basically answers the question. Fund raising through the Historical Society to support the museum's operations is germane to the Birmingham Historical Museum and Park Board's business. Raising money for the operation of the museum is therefore germane to the individual Board member's role as a City Official. The Birmingham Historical Society is a private group that supports the museum's work financially. Board members may participate, in their individual capacity, in the Historical Society's fund raising and, in any such fund raising activities, the Board members must take pains to make it clear that their fund raising activities are not approved by the City or the Birmingham Historical Museum and Park Board. Our opinion in this regard assumes that the individual Board members' activities are solely related to private fund raising efforts. The City is not bound to accept any donations which are offered or may attach conditions, in its sole discretion.

#### Conclusion

The Birmingham Historical Society may raise money for the Birmingham Historical Museum, but the Birmingham Historical Museum and Park Board cannot, as a board, raise money for the Birmingham Historical Society. The individual members of the Birmingham Historical Museum and Park Board may in their personal capacity raise money for the Birmingham Historical Society, but only if they make it clear that their participation is in their individual not City capacity.

The Ethics Board wishes to thank the members of the Birmingham Historical Museum and Park Board for bringing this matter to us. We hope this Opinion will assist Board members throughout the City as they consider the effects of the City's declining revenues on our community.



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James D. Robb, Chairperson



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John J. Schrot, Jr.



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Sophie Fierro-Share

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION REQUEST 2012-01**

**DECISION**

March 8, 2012

**I. INTRODUCTION**

Mark Nickita is a member of the Birmingham City Commission and the current Mayor of the City of Birmingham. Mr. Nickita requested the City of Birmingham Board of Ethics to issue an advisory opinion giving advice about how to conduct himself and the activities of his architectural and urban design firm, Archive Design Studio, with respect to consulting services that Archive Design Studio would like to provide to the South Eastern Michigan Council of Governments in support of the latter's effort to review and recommend plans for a publicly supported bus rapid transit system along the Woodward Avenue corridor from Detroit to Pontiac. This matter boils down to whether the efforts of Archive Design Studio, and Mr. Nickita's role in the company, place him in a conflict of interest with his official city duties and responsibilities such that Archive Design Studio may not participate in the Alternatives Analysis. If, however, no current conflict exists, how must Mr. Nickita conduct his affairs to avoid a conflict in the future?

**II. FACTS**

In December 2011, the South Eastern Michigan Council of Governments ("SEMCOG") secured grant funding to conduct a study, called an "Alternatives Analysis," intended to support efforts within the Detroit metropolitan area to improve public transportation along Woodward Avenue from Detroit to Pontiac. Various agencies and individuals have conceived of a plan using light rail transportation ("LRT"), bus rapid transit ("BRT"), or some combination of both.

The Alternatives Analysis is an important facet of the planning for the BRT component. It is funded chiefly by a grant from the United States Department of Transportation. It is not funded directly by the City of Birmingham. The Alternatives Analysis will be conducted by SEMCOG itself, not by the City of Birmingham. SEMCOG will select and engage a team of consultants to provide services toward preparation of the Alternatives Analysis. Toward that end, in February 2012 SEMCOG issued a public request for proposals from consultants who seek to participate in the project.

Mark Nickita is a member of the Birmingham City Commission and the current Mayor of the City of Birmingham. He was first appointed to city office in 1997 as a member of the city's planning board. He is co-founder and President of the architectural and urban design firm, Archive Design Studio ("Archive DS"), formed in 1991, whose offices are located in downtown Detroit. Archive DS's relevant expertise is in urban-oriented and walkable-oriented places. Mr. Nickita's professional expertise, and that of one of his partners, will be an important part of the services Archive DS provides toward

the Alternatives Analysis. Archive DS desires to be engaged to provide services toward the Alternatives Analysis. It plans to participate as a member of a team that will submit a proposal in response to SEMCOG's request.

As currently envisioned, Archive DS will not contract directly with SEMCOG. Rather, Archive DS will be a subcontractor under a contract between the prime contractor and SEMCOG.

The identity of the proposed prime contractor with which Archive DS is affiliated is not disclosed to us. But Mr. Nickita stated that that contractor has engaged Archive DS previously, including before the time he became a member of the Birmingham City Commission.

The City of Birmingham is a member of SEMCOG. It paid dues to SEMCOG this year in the amount of \$2,657. The city has appointed Commissioner Scott Moore to be its current liaison with SEMCOG. We are apprised that the SEMCOG contract for the Alternatives Analysis will be approved by SEMCOG's executive committee, of which no one on behalf of the City of Birmingham is a member.

### **III. STANDARD OF CONDUCT**

As Mayor and a member of the Birmingham City Commission, Mr. Nickita is a city official subject to the code of ethics set forth within the city's ethics ordinance. City of Birmingham Code of Ethics § 2-322(2). The code of ethics requires, as a core premise, that city officials must:

- (1) Be independent;
- (2) Make governmental decisions and policy in proper governmental channels;
- (3) Not use public office for personal gain.

*Id.* § 2-320.

Generally, city officials "are bound to observe in their official acts the highest standards of morality and to discharge the duties of their offices faithfully, regardless of personal consideration, recognizing that their conduct in both their official and private affairs should be above reproach." *Id.* § 2-321. They "shall safeguard public confidence by being honest, fair, and respectful of all persons and property with whom they have contact, by maintaining non-partisanship in all official acts, and by avoiding conduct which may tend to undermine respect for city officials. *Id.*

To set the tone for official conduct, the City of Birmingham intends through its code of ethics "that city officials and employees avoid any action . . . which might result in or create the appearance of

- (1) Using public employment or office for private gain;
- (2) Giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person;
- (3) Losing complete independence or impartiality of action;
- (4) Making a city decision outside official channels; or
- (5) Affecting adversely the confidence of the public or the integrity of the city government.

*Id.* § 2-323.

We are informed by previous decisions of the Board of Ethics concerning potential or perceived conflicts of interest. We have considered various provisions of section 2-324 of the code of ethics in Advisory Opinions 2003-03 and 2009-01. More specifically, the following conflict of interest provisions are relevant to this matter:

- (1) No official or employee of the city shall divulge to any unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.
- (2) No official or employee of the city shall represent his or her personal opinion as that of the city.

....

- (5) No official or employee of the city shall engage in a business transaction in which he or she may profit because of his or her official position or authority or benefit financially from confidential information which he or she has obtained or may obtain by reason of such position or authority.
- (6) No official or employee of the city shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties. This section shall not prohibit a part-time elected or appointed city official from engaging in private employment or business on his or her own time as a private citizen and where city business is not involved, subject to his or her disclosing such private employment or business on the public record for any matter on which he or she may be called upon to act in his or her official capacity . . . . He or she shall refrain from voting upon or otherwise participating in debate on any such matter.

....



- (8) No official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.
- (9) It is recognized that various boards and committees are part of the plan of government for the city. As such, it is further recognized that by virtue of the various requirements for membership of the board, a member may be placed in the position of participating in a decision that may directly or indirectly affect his or her financial or personal interests. Therefore, those members of the various boards and committees . . . may participate in such decisions provide that they act:
- a. In furtherance of the public good;
  - b. In compliance with the duties of their respective boards; and
  - c. In a manner consistent with subsection (8) of this section.

*Id.* § 2-324(a)(1)-(9).

The next provision of the code of ethics defines conflict of interest.

A conflict of interest exists if:

- a. The city official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of a matter currently before that city official or employee, or is associated as an owner, member, partner, officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's or employee's governmental duties, or;
- b. The city official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity, or;
- c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest.

*Id.* § 2-324(a)(10).

#### IV. ANSWER AND ANALYSIS

The Board of Ethics finds that the Mr. Nickita is not prohibited by the code of ethics from having his firm, Archive DS, participate as a member and subcontractor of a consulting team that proposes to contract with SEMCOG to provide services toward the Alternatives Analysis project.

As noted previously:

- (5) No official or employee of the city shall engage in a business transaction in which he or she may profit because of his or her official position or authority or benefit financially from confidential information which he or she has obtained or may obtain by reason of such position or authority.

*Id.* § 2-324(a)(5).

We find that City of Birmingham presently has no direct role in the contract. Mr. Nickita's role as a Birmingham public official is relevant to his professional background. Indeed, Mr. Nickita will be disclosing his relationship with the city in Archive DS's portion of the proposal to be submitted by the prime contractor to SEMCOG for its consideration, as he should. But we find that Mr. Nickita's role with the city is not likely to be a material factor in SEMCOG's selection of the ultimate prime contractor.

Similarly, the code of ethics recognizes that city officials may conduct their personal business so long as they do so in a way that is consistent with the requirements of the code.

- (6) No official or employee of the city shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties. **This section shall not prohibit a part-time elected or appointed city official from engaging in private employment or business on his or her own time as a private citizen and where city business is not involved, subject to his or her disclosing such private employment or business on the public record for any matter on which he or she may be called upon to act in his or her official capacity . . . . He or she shall refrain from voting upon or otherwise participating in debate on any such matter.**

*Id.* § 2-324(a)(6) (emphasis added).

We next find no evidence on this record that Mr. Nickita has used his official position to secure, or attempt to secure, the participation of Archive DS in the project. The relevant provision is:

- (8) No official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.

*Id.* § 2-324(a)(8).

The Board of Ethics notes, however, that there remains the potential for a conflict should the City of Birmingham be asked to participate in the Alternatives Analysis, including funding for it. A relevant portion of the code of ethics provides as follows:

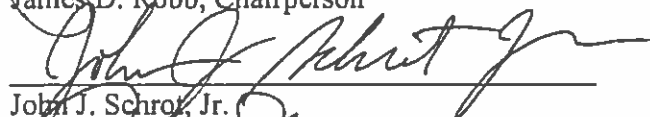
- (7) No official or employee of the city shall participate, as an agent or representative of the city, in the negotiation or execution of contracts, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision, relating to any business entity in which he or she has, directly or indirectly, a financial or personal interest.

*Id.* § 2-324(a)(7). Should the question of the City of Birmingham's participation in the Alternatives Analysis arise, Mr. Nickita will need to consider whether he may properly participate in the city's consideration of that participation in light of the code of ethics. The Board of Ethics invites Mr. Nickita to submit an additional request for advisory opinion if he desires.

The Board commends Mr. Nickita for submitting his request for this advisory opinion.



James D. Robb, Chairperson



John J. Schroz, Jr.



Sophie Fierro-Share

# ETHICS ORDINANCE

## BIRMINGHAM CODE OF ORDINANCES

May 11, 2018

### ARTICLE IX. - ETHICS<sup>[9]</sup>

Footnotes:

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**Editor's note**— Ord. No. 1810, adopted May 19, 2003, states that the provisions of this article shall become effective July 21, 2003.

Sec. 2-320. - Public policy.

Public office and employment are public trusts. For government to operate properly, each city official, employee, or advisor must earn and honor the public trust by integrity and conduct.

The city hereby declares that all city officials and employees must avoid conflicts between their private interests and the public interest. Public officials and employees must:

- (1) Be independent, impartial and responsible to the people;
- (2) Make governmental decisions and policy in the proper governmental channels;
- (3) Not use public office for personal gain.

To enhance public trust, the city must provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants.

This Code sets minimum standards of ethical conduct for all city officials and employees, elected or appointed, paid or unpaid. It proscribes actions incompatible with the public interest and directs disclosure of private financial or other interests in matters affecting the city.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)

Sec. 2-321. - Responsibilities of public office.

City officials and employees are bound to uphold the Constitution of the United States and the Constitution of the State and to carry out impartially and comply with the laws of the nation, state, and the city. City officials and employees must not exceed their authority or breach the law or ask others to do so. City officials and employees are bound to observe in their official acts the highest standards of ethical conduct and to discharge the duties of their offices faithfully, regardless of personal consideration, recognizing that their official conduct should be above reproach.

All city officials and employees shall safeguard public confidence by being honest, fair and respectful of all persons and property with whom they have contact, by maintaining non-partisanship in all official acts, and by avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04; Ord. No. 2177, 3-28-16)

Sec. 2-322. - Definitions.

*City official or employee* means a person elected, appointed or otherwise serving in any capacity with the city in any position established by the City Charter or by city ordinance which involves the exercise of a public power, trust or duty. The term includes all officials and employees of the city, whether or not they receive compensation, including consultants and persons who serve on advisory boards and commissions. The term does not include election inspectors and student representatives appointed to city boards or commissions.

*Consultant* means a person who gives professional advice or services regarding matters in the field of his or her special knowledge or training.

*Compensation* means any money, property, thing of value or benefit conferred upon or received by any person in return for services rendered or to be rendered to himself or herself or any other party.

*Financial interest* means any interest in money, property or thing of value or benefit.

*Immediate family* means a city official or employee, his or her spouse, parents or children.

*Official duties or official action* means a decision, recommendation, approval, disapproval or other action or failure to act, which involves the use of discretionary authority.

*Personal interest* means an interest arising from blood or marriage relationships or any business association.

*Private gain* means any interest or benefit, in any form, received by a city employee or official.

*Substantial* shall mean considerable in quantity or significantly great.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)

Sec. 2-323. - Intention of code.

It is the intention of section 2-324 below that city officials and employees avoid any action, whether or not specifically prohibited by section 2-324, which might result in, or create the appearance of:

- (1) Using public employment or office for private gain;
- (2) Giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person;

- (3) Losing complete independence or impartiality of action;
- (4) Making a city decision outside official channels; or
- (5) Affecting adversely the confidence of the public or the integrity of the city government.

The code of ethics is intended to be preventative and not punitive. It should not be construed to interfere with or abrogate in any way the provisions of any federal or state statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement.

This declaration of policy is not intended to apply to contributions to political campaigns, which are governed by state law.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)

Sec. 2-324. - Promulgation.

(a) *Conflict of interest—General.*

- (1) No official or employee of the city shall divulge to any unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.
- (2) No official or employee of the city shall represent his or her personal opinion as that of the city.
- (3) Every official or employee of the city shall use personnel resources, property and funds under his or her official care and control solely in accordance with prescribed constitutional, statutory and regulatory procedures and not for personal gain or benefit.
- (4) No official or employee of the city shall directly or indirectly, solicit or accept any gift or loan of money, goods, services or other thing of value for the benefit of any person or organization, other than the city, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties.

Gratuities do not include fees for speeches or published works on legislative subjects and, except in connection therewith reimbursement for expenses for actual expenditures for travel, and reasonable subsistence, for which no payment or reimbursement is made by the city, invitations to such events as ground breakings, grand openings, charitable or civic events, or inconsequential gifts from established friends.

- (5) No official or employee of the city shall engage in a business transaction in which he or she may profit because of his or her official position or authority or benefit financially from confidential information which he or she has obtained or may obtain by reason of such position or authority.

- (6) No official or employee of the city shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties.

This section shall not prohibit a part-time elected or appointed city official from engaging in private employment or business on his or her own time as a private citizen and where city business is not involved, subject to his or her disclosing such private employment or business on the public record for any matter on which he or she may be called upon to act in his or her official capacity, in accordance with Section 5 B below. He or she shall refrain from voting upon or otherwise participating in debate on any such matter.

- (7) No official or employee of the city shall participate, as an agent or representative of the city, in the negotiation or execution of contracts, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision, relating to any business entity in which he or she has, directly or indirectly, a financial or personal interest.

- (8) No official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.

- (9) It is recognized that various boards and committees are part of the plan of government for the city. As such, it is further recognized that by virtue of the various requirements for membership of the board, a member may be placed in the position of participating in a decision that may directly or indirectly affect his or her financial or personal interests. Therefore, those members of the various boards and committees in the city, as they may be established from time to time, may participate in such decisions provided that they act:

- a. In furtherance of the public good;
- b. In compliance with the duties of their respective boards; and,
- c. In a manner consistent with subsection (8) of this section.

- (10) Determination of conflict of interest. A conflict of interest exists if:

- a. The city official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of a matter currently before that city official or employee, or is associated as owner, member, partner, officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's or employee's governmental duties, or;

- b. The city official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity, or;
  - c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest.
- (11) Subsequent conflict of interest. No official or employee of the city shall acquire any financial interest in or accept any employment concerning any project which has been granted approval by the city or any commission, board, department or employee thereof within one year of the official's or employee's participation in any manner in considering or recommending the approval or disapproval of said project.

(b) *Full disclosure.*

- (1) Responsibility to disclose. It shall be the responsibility of the official or employee to disclose the full nature and extent of his or her direct or indirect financial or personal interest in a matter before him or her.

No official or employee of the city shall participate, as an agent or representative of the city, in approving, disapproving, voting, abstaining from voting, recommending or otherwise acting upon any matter in which he or she has directly or indirectly a financial or personal interest. The official or employee shall, in such circumstances, recuse himself or herself from the matter before him or her.

- (2) Disclosure of conflict of interest and disqualification.

- a. Any city official or employee who has a conflict of interest, as defined herein, in any matter before the city shall disclose such fact on the appropriate record of the city prior to discussion or action thereon and shall refrain from participating in any discussion, voting or action thereon, as follows, provided that such exceptions shall be observed as are permitted by law:

1. A city commissioner shall disclose any conflict of interest and the nature and extent of such interest on the record of the city commission;
2. A member of any city board, commission or committee shall disclose any conflict of interest and the nature and extent of such interest on the records of said board, commission or committee;
3. A city employee who has a financial or other interest in a matter before the city commission or any city board, commission or committee and who participates in discussion with, or gives an official opinion to the city commission, or to such other city board, commission or committee relating to such matter, shall disclose on the records of the city commission or such other city board, commission or committee, as



the case may be, any conflict of interest and the nature and extent of such interest.

4. Otherwise, any appointed city official or employee shall address such a disclosure to the supervisory head of his or her department, and any elected city official shall address such a disclosure to the general public.
- b. If a city official, commissioner or employee who has a conflict of interest, as defined herein, in any matter before the city, and who discloses that conflict on the appropriate records but who refuses to refrain from discussion, deliberation or voting thereon, the matter under consideration shall be immediately referred to the board of ethics for a final determination as to the conflict in question and whether the official, commissioner or employee must refrain from discussion, deliberation, action or voting thereon.
  - c. Within 20 days after election, employment, appointment, or the effective date of this ordinance, or any change in the facts set forth in the city official's or employee's previously filed disclosure statement, each city official and employee shall file with the city clerk an affidavit and disclosure statement. The city clerk shall provide each city official or employee with the required affidavit and disclosure statement form immediately upon his or her election, employment or appointment. The affidavit and disclosure statement does not apply to part-time and temporary employees of the city. Additionally, the disclosure requirements on this section do not apply to regular full-time employees below the level of assistant department head, except at the discretion of the city manager.
  - d. The effective date for this ordinance shall be July 21, 2003.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)

Sec. 2-325. - Violation, enforcement and advisory opinions.

(a) *Board of ethics.*

- (1) The city commission shall appoint a board of ethics, consisting of three members, as an advisory body for the purpose of interpreting this code of ethics.
- (2) The initial three members of the board of ethics shall be appointed for one-, two-, and three-year terms of office respectively, which shall begin on July 1, 2003. If appointed prior to July 1st, they shall begin their terms of office immediately and their terms shall include the additional time prior to July 1st. Terms of office shall expire on June 30th of the respective years.

Thereafter, all members shall be appointed to three-year terms, beginning July 1, so that only one member's term expires each year. A member shall hold office until his or her successor is appointed. The city commission shall fill a vacancy by an appointment for the unexpired term only.

- (3) The board of ethics shall be made up of residents of the city who have legal, administrative or other desirable qualifications.
  - a. The members of the board of ethics shall serve without compensation, and shall not be elected officials, persons appointed to elective office, full-time appointed officials or city employees, nor shall they be currently serving on any other city board or commission.
  - b. The board shall select its own presiding officer from among its members.
  - c. The board shall establish such procedures it deems necessary or appropriate to perform its functions as set forth in this article.
- (b) *Functions of the board of ethics.* When there is a question or a complaint as to the applicability of any provision of this code to a particular situation, that question or complaint shall be directed to the board of ethics. It shall then be the function of the board of ethics to conduct hearings and/or issue an advisory opinion, as applicable.
  - (1) Hearings. The board of ethics shall follow the following hearing procedure:
    - a. The board shall, within seven days after any matter is brought to its attention, set a date certain for hearing said matter.
    - b. The board shall, at least 28 days before the hearing date, send notice of such hearing, accompanied by a concise statement of the alleged breach of this code of ethics, to any person requested to appear before them, by certified mail, return receipt requested, to addressee only.
    - c. Any person requested to appear before a board of ethics hearing may request one extension for a period not to exceed 28 days. Extensions thereafter will be granted only under extreme circumstances.
    - d. Any person requested to appear before a board of ethics hearing may be accompanied by his or her attorney.
    - e. All hearings at which any person shall be requested to appear shall be subject to the Open Meetings Act.
    - f. All findings of board hearings shall be published in permanent form and communicated to the city commission and the public, subject to the requirements of the Open Meetings Act.
  - (2) Advisory opinions. All advisory opinions so issued shall also be published in permanent form and communicated to the city commission and the public, subject to the requirements of the Open Meetings Act.

- (3) After the board of ethics' advisory opinions and/or hearing findings have been published:
- a. The city commission shall be responsible for imposing any sanction for a violation of this Code on one of its members or any person appointed by the commission to any city board.
  - b. If it becomes necessary to seek the removal of a city official after the board of ethics' advisory opinion and/or hearing findings, the city shall follow the requirements for removal of a public official in accordance with the laws of the state.
  - c. The city manager shall be responsible for imposing any discipline for a violation of this Code on any employee of the city.

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)

Sec. 2-326. - Affidavit and disclosure statement.

Immediately following an election, employment or appointment of a city official or employee, the city clerk shall provide the individual with an affidavit and disclosure statement form. Within 20 days after election, appointment, employment or any change in the facts set forth in the city official's or employee's previously filed affidavit and disclosure statement, all city officials or employees shall file with the city clerk an affidavit and disclosure statement including the following:

- A. A disclosure statement responding in detail to the following questions:
  1. To the best of your knowledge, do you or any members of your immediate family own any interest in real property located within the City of Birmingham, in land contiguous to the City of Birmingham, or in any area covered by a 425 Agreement to which the City of Birmingham is party?
  2. If your answer to question 1. is affirmative, to the best of your knowledge state the following information for each such interest owned:
    - (a) The nature of your interest in the real property;
    - (b) The location of the real property (for improved property, provide the street address; for unimproved property state its location in relation to existing streets), and;
    - (c) The property's permanent real estate tax identification number.
  3. To the best of your knowledge, do you or members of your immediate family own five percent (5%) or more of any business entity located in the City of Birmingham?
  4. If your answer to question 3. is in the affirmative, state the following, to the best of your knowledge:
    - (a) The name of the entity;

- (b) The address of the entity;
  - (c) The nature of your relationship to the entity, and;
  - (d) The date relationship commenced.
5. To the best of your knowledge, do you or any members of your immediate family have any direct financial or business relationships with any supplier, service provider or contractor of the City of Birmingham from which you or they derive direct compensation or financial benefit that is not reported in the prior answers.
6. To the best of your knowledge, have you or any members of your immediate family given or received any gifts, other than from immediate family members, the value of which exceeds \$50.00, within the last year, or since the effective date of this code, whichever time period is shorter, to or from any person or business or other legal entity doing business with the City, other than legal campaign contributions? If so, list the names and addresses of each donor or donee of each such gift and the date upon which it was made and the nature of the gift.
- B. An affidavit in which the City official or employee states: "I have read and I understand the Code of Ethics of the City of Birmingham and, to the best of my knowledge, I am not in conflict with its provisions."

Dated:

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Notary Public

\_\_\_\_\_ County, Michigan

My Commission Expires: \_\_\_\_\_

(Ord. No. 1805, 4-28-03; Ord. No. 1810, 5-19-03; Ord. No. 1819, 1-12-04)