

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
JUNE 12, 2019 3:00 - 5:00 PM**

**151 MARTIN ST., BIRMINGHAM MI 48009
CONFERENCE ROOMS #202/203**

I. CALL TO ORDER

Chairperson James Robb

II. ROLL CALL

J. Cherilynn Mynsberge, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of January 23, 2019

IV. UNFINISHED BUSINESS

VI. NEW BUSINESS

- A. Hearings on Ethics Complaints:
 - 1. 2019-03 Complaint: City Manager Joe Valentine, submitted by Clinton Baller
 - 2. 2019-04 Complaint: Mayor Patricia Bordman, submitted by Clinton Baller
- B. Supplemental Opinion to Advisory Opinion 2018-02

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 on June 6, 2019.

J. Cherilynn Mynsberge

Packets to be sent via email to:

Board Members
City Attorney Tim Currier
City Manager Joe Valentine
Mayor Patty Bordman

**CITY OF BIRMINGHAM
BOARD OF ETHICS MINUTES
JANUARY 23, 2019 5:00 PM
151 MARTIN ST., BIRMINGHAM MI 48009
CITY COMMISSION ROOM #205**

I. CALL TO ORDER

Chairman Robb called the meeting to order at 5:05 p.m.

II. ROLL CALL

Present: James Robb, Chairman
Sophie Fiero-Share
John Schrot

Absent: none

Administration: City Manager Valentine, City Attorney Currier, City Clerk Mynsberge

III. APPROVAL OF MINUTES

A. Approval of minutes of October 11, 2019

MOTION: Motion by Mr. Schrot, supported by Ms. Fiero-Share:
To approve the minutes of October 11, 2019 as submitted.

VOTE: Yeas, 3
Nays, 0
Absent, 0

IV. UNFINISHED BUSINESS

None.

VI. NEW BUSINESS

Chairman Robb deviated from the agenda.

B. Report from Chairman Robb regarding his conversation with Alicia Skillman, the Executive Director of the Detroit Board of Ethics, on the topic of ethics training.

Chairman Robb shared the following:

- The Detroit Board of Ethics was established by ordinance and is composed of seven members. Three members are appointed by the mayor, three are appointed by the City Council, and one member is appointed by both.
- The Board has three full-time employees.
- Dawn Whitman, an attorney and former FBI agent, is the investigator of ordinance violation claims.
- Ms. Whitman has independent authority to seek out problems. Her job is, in part, to be a watchdog.
- Ms. Whitman refers potential issues to the Executive Director, who can direct them to the Board.
- The Board also hears complaints and requests for advisory opinions.

- The City of Detroit has 9,000 employees, and the Board attempts to hold one training session per year.
- The focus of training is on disclosure requirements, campaign contributions, lobbying restrictions, and the general codes of conduct.
- The Board saw a substantial increase in complaints filed once training started.
- The Board has considered a number of commercial platforms for training, and has made a preliminary decision not to use commercial solutions due price and lack of adaptability. They plan to develop their own content and devise a method by which to share it.
- The Board meets the third Tuesday of every month.

Mr. Schrot suggested developing a handbook for distribution.

Chairman Robb asked if it would be helpful to have a one-pager on the ethics ordinance, which would be a statement of principles and citations.

City Attorney Currier noted the City, its staff and officials must abide by all federal, state and local laws, which is a catchall.

City Manager Valentine suggested identifying goals first, then determining the best approach to meet the goals. He commented, in response to Mr. Robb, that additional education is never a bad thing.

Chairman Robb said he thought the current Food for Thought presentation is a good approach.

Mr. Schrot suggested staff liaisons to City boards and committees should promote awareness of the ethics ordinance periodically with their boards. He noted all material is online and easy to access and also commented that board members have taken an oath to uphold the ordinance.

A. Further Discussion of Conflict of Interest Provisions - Advisory Opinion Draft

Ms. Fierro-Share summarized her separate opinion. If the advisory board of an individual member has made a determination as to that board member meeting the standards of 2-324(a)(9), the Ethics Board should respect that decision unless there is convincing evidence that it is mistaken. In evaluating whether a citizen board member has an indirect financial or personal interest, the Ethics Board should avoid speculation. A citizen board member need only be recused from participating in a matter if he, she, or the board in question has concluded by majority vote that a conflict of interest exists, and referral to the Ethics Board for immediate determination of a conflict of interest should occur when the advisory board has determined there is a disqualifying conflict of interest and the member still objects to recusal.

Ms. Fierro-Share, referring to Mr. Schrot's opinion, page 7, 4th paragraph, 2nd sentence, recommended changing "may" to "is reasonably likely". She drew the Board's attention to the three requirements which demonstrate that there is no conflict of interest and said that if a board member asserts that they are meeting those requirements, said board member should be believed. She added she did not think a unanimous vote should be necessary, since no other matters before boards and committees require a unanimous vote.

Mr. Schrot said that, in the subject case, the committee chair did not follow procedure by unilaterally deciding that Mr. Kalczynski need not recuse himself. The Advisory Parking Committee (APC) should have had a vote in order to clarify if other members of the Committee were concerned about a potential conflict of interest. Mr. Schrot also said that Mr. Kalczynski's stating there was no conflict of interest did not mean the question was resolved.

Ms. Fierro-Share asked how the Ethics Board proceeds if a member of another board states they have no conflict of interest but there is concern there may be a conflict of interest.

Mr. Schrot said the Ethics Board looked at Mr. Kalczynski's case in the context of the Ethics Ordinance (Ordinance). The Ethics Board found from the standpoint of Mr. Kalczynski's personal conduct he was not attempting to act in his own individual best interest or in his financial best interest. From there, the Ethics Board also had to consider whether there was the appearance of impropriety. The fact that a community leader like Mr. Hohendorf perceived a potential conflict of interest indicated to Mr. Schrot that there was public perception that the Ordinance may have been violated in this case. Mr. Schrot also noted there was history of conflict between the Daxton Hotel, which was the subject of the APC vote in question, and the Townsend Hotel, which is Mr. Kalczynski's employer. The opinion emphasizes that board members must be sensitive to the public appearance of conflict of interest as well as actual conflict of interest.

Ms. Fierro-Share asked if it mattered that no members of the APC objected to the Chair's unilateral finding of no conflict of interest for Mr. Kalczynski.

Mr. Schrot noted that the lack of committee engagement also posed a problem for the Ordinance, thus compounding the concern, which is why the Ethics Board was called upon to issue an advisory opinion.

Chairman Robb said that if the majority of the Committee members had voted that there was not a disqualifying conflict, that would have been the end of the matter. The Chairman agreed that a majority vote should suffice in these cases. He also said that he believes the Ethics Board ultimately took Mr. Kalczynski at his word, because Mr. Kalczynski stated, for instance, that he receives no bonus for the performance of the hotel.

Ms. Fierro-Share said the Ethics Board should constrain itself to asking members of other boards and committees to adhere to the three requirements for preventing conflict of interest. If the Ethics Board believes additional guidelines should be added to the Ordinance to guide behavior, it should do so. She added that there is always the potential for the appearance of a conflict of interest since professionals serve on the City's advisory boards.

Mr. Schrot opined that it was not speculation as to whether Mr. Kalczynski may have had an interest in the parking situation of a rival hotel. He reiterated that if the APC had voted on the matter, as was appropriate, the vote would likely have resolved the question from Mr. Hohendorf. Since a vote was not taken by the APC, it was necessary for the Ethics Board to review the situation when a complaint was filed. The APC did not follow the Ordinance. The advisory opinion stemming from the issue set forth the need for awareness among boards and committees of their responsibilities under the Ordinance.

Chairman Robb and Mr. Schrot agreed with Ms. Fierro-Share that a vote for no conflict on a board or committee need not be unanimous.

Ms. Fierro-Share asked how the Ethics Board would proceed if a board or committee voted for no conflict regarding one of its members and a citizen filed a complaint anyway.

Mr. Schrot said it would still be incumbent on the Ethics Board to review the complaint. Mr. Schrot distinguished between there being a recusal question, which a board could vote on, and a conflict of interest question, which may stand regardless of the board's vote for no conflict. Other boards and committees may not make the same distinctions the Ethics Board is bound by.

Chairman Robb, referencing Section 2-324(a)(9), stated that even when a board or committee member says they are adhering to all three requirements, the Ethics Board still retains the right to review the matter. He said the City's boards and committees must be made more aware of the Ordinance and recusal procedure. He asked Ms. Fierro-Share if she would like to propose an amendment to the Ordinance, since that is part of the Ethics Board's purview.

Ms. Fierro-Share said she wanted to revisit some elements in the Ordinance and tighten up the language for clarity. She said that the City may need stronger ethics language than it has now.

Mr. Schrot said that if the Ethics Board was to recommend an amendment to the Ordinance it should be based on the Board's experience. He suggested that the issue stems more from a lack of awareness of the City's ethics requirements than it does from the Ordinance itself.

Chairman Robb asked if there was something the Ethics Board could do in terms of increasing training. He said that no explicit recusal procedures are included in the Ordinance at this time.

City Attorney Currier said the Ethics Board is necessary as a safety valve in case a City board or committee is not carrying out its ethical obligations.

City Manager Valentine confirmed that the question of recusal is the most common question fielded by City staff in regards to the Ordinance.

Chairman Robb said that the next Food for Thought would focus on recusal and other practical issues.

City Attorney Currier noted that members of boards will routinely disclose information that could give the appearance of a conflict of interest, even though said member asserts that there is no conflict of interest, and then will ask their fellow board members whether they should remain to vote on the issue. City Attorney Currier noted that at least in this fashion there is disclosure and the opportunity for the board members to voice concerns should any exist. He said while it is not an explicit vote, it does not make the process invalid. He continued that it would be best if the chair asked whether there were any concerns about the disclosed information, and should call for a vote if any concerns are voiced. If City

board and committee chairs were made aware of this process, it could alleviate much of the confusion that seems to exist currently.

Mr. Schrot suggested the Ethics Board should meet with the City's board and committee chairs, review the import of the Ordinance, and offer to answer any questions. He recommended the chairs discuss it with their respective boards as an agenda item, determine whether the boards perceive ambiguity, and if so return to the Ethics Board for further clarification.

City Attorney Currier said City staff could also discuss the information with staff board liaisons during department meetings in order to further expand awareness of the available information.

City Manager Valentine recommended filming the proposed meeting between the Ethics Board and board chairs discussing the Ordinance so that it would be available as a future resource.

Ms. Fierro-Share suggested writing a one-page document on the process of recusal that would be available for all boards.

Asking staff board liaisons and board chairs for the most common questions regarding the Ordinance was recommended by Chairman Robb in order to create a more targeted presentation.

Mr. Schrot said putting a frequently asked questions (FAQ) document on the City website regarding the Ordinance would allow easier access to the information. He also noted that it is the responsibility of each board chair to understand what the Ordinance requires.

Chairman Robb said he would also like the opinions of the Ethics Board to be indexed in some way. In drawing the meeting to a close, he invited City staff to determine whether the Ethics Board should meet with staff liaisons and board chairs. He said it would be best to know the questions chairs and staff have before preparing an FAQ or a one-page document with Ordinance information.

City Manager Valentine said the City would come up with dates when the Ethics Board could meet with board and committee members to ascertain what aspects of the Ordinance need clarification. Subsequently, the Ethics Board could take the information from the meeting and create documentation that could be shared. Ms. Fierro-Share said the atmosphere of the meeting should be intentionally conducive to conversation.

VII. PUBLIC COMMENT

There were no members of the public present.

VIII. ADJOURN

The meeting was adjourned by Mr. Robb at 6:37 p.m.

J. Cherilynn Mynsberge
City Clerk



Case No. 2019-03
(Assigned by clerk)

ETHICS INCIDENT/COMPLAINT FORM

Any person who has a complaint against a city official or employee, as defined in the Code of Ethics, alleging that conduct of that official or employee is in breach of the code, may bring the matter before the Birmingham Board of Ethics by filing this form with the city clerk. Within seven days upon receipt of this filing, the clerk will set a hearing for this matter and notify the parties involved according to the ordinance.

All advisory opinions will be communicated to the city commission and will be published on the city's website at www.bhamgov.org.

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

1. Name the person alleged to have violated one or more provisions of the City of Birmingham's Ethics Ordinance (Chapter 2, Article IX), and provide the following information, if known. If you are alleging that more than one person may have violated the City of Birmingham's Ethics Ordinance, file a separate complaint form for each individual. The information on this form may be subject to disclosure under the Freedom of Information Act.

City Manager Joe Valentine

2. Explain why you believe that the individual named above may have violated the City of Birmingham's Ethics Ordinance. Be as specific as possible as to dates, times, places, and actions. Attach additional sheets of paper if the space provided below is not sufficient. Also note which specific section in the ordinance was violated.

City Manager Joseph Valentine approved the issuance of an RFP for the development of N. Bates St. that was written with substantial assistance from architect Victor Saroki and his firm, and then allowed a development group that includes Mr. Saroki and his firm to respond to the RFP.

This is in direct violation of Section 2-321 of the Ethics Ordinance, which states, in part: "City officials and employees are bound to observe in their official acts the highest standards of ethical conduct."

It also is in violation of Section 2-324(a)(1) and (8), which provide that:

"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," and that, "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."

3. Attach or make reference to any document or other evidence that may support your allegations. Also provide the names and addresses (if known) of any witnesses or persons who may have knowledge of facts that support your allegations.

The "highest standards of ethical conduct" in such matters is best exemplified by the policies and procedures of a range of other governmental entities. The County of Oakland, the State of Michigan and the government of the United States accordingly include in RFPs language that explicitly and expressly prohibit those who participate in the formulation of an RFP from responding to that RFP.

Oakland County policy 2300.3 states: "Technical consultants, manufacturers, or vendors preparing formal specifications shall be precluded from bidding on their specifications for that job." <https://www.oakgov.com/purchasing/about-us/Pages/policies-and-procedures.aspx>.

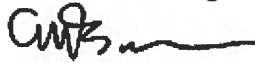
The State of Michigan includes on its proposals the following question: "Did your company, an employee, agent, or representative of your company, or any affiliated entity participate in developing any component of this solicitation? For purposes of this question, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly: (1) either one controls or has power to control the other or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities or equipment, and common use of employees. If you entered 'YES', you are not eligible for contract award or to work as a subcontractor for the awarded vendor."

The federal government has promulgated regulations governing conflicts of interest in contracting, which are attached.

4. Are you aware of any civil, criminal or administrative action pending that involves the same parties as alleged in this complaint which involves substantially the same subject matter? If so identify in detail.

US District Court for the Eastern District of Michigan
Darakjian et al v. City of Birmingham et al
Case Number:
2:19-cv-10277-VAR-EAS

5. I declare that the foregoing information is true and accurate to the best of my knowledge



5/10/2019

Your signature _____ Date _____

Clinton Baller

Your printed name _____

Address 822 Shirley Rd., Birmingham, MI 48009

(Number, Street, City, State, Zip)

Daytime Phone (248) 703-8365 Evening Phone (____) _____

Email cmballer@visa-master.com

Please return this completed form to: City Clerk's Office

City of Birmingham
151 Martin, P.O. Box 3001
Birmingham, MI 48012

If you have questions about this form, or would like to request the form in an alternate format for the visually impaired, contact the Clerk's Office at 248.530-1880 or write us at the above address. We will take reasonable steps to accommodate your needs.

NOTE: Within seven days of receipt of this form, the Birmingham Ethics Board will set a date for hearing this matter. Any parties involved will be given 28 days notice to appear at the hearing.

Revised 8/16/12

FOR OFFICE USE ONLY

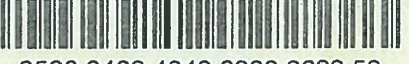
Accepted by C. Mynsberge

Date 5-16-2019



May 31, 2019

City Manager Joseph A. Valentine
City of Birmingham
151 Martin St.
Birmingham MI 48009

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">■ Complete items 1, 2, and 3.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits.		<p>A. Signature <i>X Samuel A. Valentine</i></p> <p>B. Received by (Printed Name) <i>Samuel A. Valentine</i></p> <p>C.</p> <p>D. Is delivery address different from item 1? If YES, enter delivery address below:</p>	
1. Article Addressed to: <i>2019-03</i> City Manager Joe Valentine City of Birmingham 151 Martin Birmingham MI 48009			
 9590 9402 4648 8323 2629 52		3. Service Type <input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
2. Article Number (Transfer from sender's label) 7017 2400 0000 1919 7004		<input type="checkbox"/> Priority <input type="checkbox"/> Registered <input type="checkbox"/> Registered Delivery <input type="checkbox"/> Return Receipt <input type="checkbox"/> Signature <input type="checkbox"/> Signature Restricted	
PS Form 3811, July 2015 PSN 7530-02-000-9053		Domestic	

RE: Ethics Complaint 2019-03 Valentine

Mr. Valentine:

Your request for a waiver of the 28-day notice provision of the Board of Ethics Procedural Rules, Chapter 3 Procedure for Resolving Complaints, is granted. Therefore, I am supplying you with the following notice of the rescheduled hearing date on the above captioned complaint.

REVISED NOTICE OF HEARING BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-03 regarding City Manager Joseph A. Valentine.

The hearing, originally scheduled for Tuesday, July 2, 2019 at 2:30 p.m., has been rescheduled. The hearing will now be held on Wednesday, June 12, 2019 at 3:00 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009. You are requested to appear at this hearing.

This hearing will be held in accordance with the Open Meetings Act.

If you have any questions, please feel free to contact me.


J. Cherilynn Mynsberge
City Clerk

Enclosures

Mailed via certified mail May 31, 2019

Ethics Complaint 2019-03

1 message

Joe Valentine <jvalentine@bhamgov.org>

To: Cherilynn Mynsberge <cmynsberge@bhamgov.org>

Wed, May 22, 2019 at 9:43 AM

Cherilynn,

I am in receipt of Ethics Incident/ Complaint #2019-03 and request a waiver of the 28 day notice provision so this matter can be addressed as soon as possible. Should you have any questions, please let me know.

Regards,

--

Joseph A. Valentine

City Manager

City of Birmingham

151 Martin Street

Birmingham, MI 48009

(248) 530-1809 Office Direct

(248) 530-1109 Fax

jvalentine@bhamgov.org

Twitter: @JoeValentine151

To get the latest information regarding the City of Birmingham, please sign up for our communication tools by clicking here www.bit.ly/bhamnews.



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: 2019-03

Clinton Baller
822 Shirley Road
Birmingham, MI 48009



9590 9402 4648 8323 2629

2. Article Number (from label)
7017 2400 0000 1919 6991

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

6-4-19

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

May 31, 2019

Clinton Baller
822 Shirley Road
Birmingham, MI 48009

RE: Ethics Complaint 2019-03 Valentine

Mr. Baller:

City Manager Joseph A. Valentine has requested a waiver of the 28-day notice provision of the Board of Ethics Procedural Rules, Chapter 3 Procedure for Resolving Complaints, a copy of which has been previously provided to you. A copy of Mr. Valentine's request for waiver is enclosed.

I grant his request and therefore supply you with the following notice of the rescheduled hearing date on the above captioned complaint.

REVISED NOTICE OF HEARING
BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-03 regarding City Manager Joseph A. Valentine.

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This hearing will be held in accordance with the Open Meetings Act.

If you have any questions, please feel free to contact me at 248-530-1802 or at cmynsberge@bhamgov.org.

Cheryl Lynn Mynsberge

enclosures

Emailed to cmballer@visamaster.com May 31, 2019
Mailed via certified mail May 31, 2019

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY																	
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to: <u>2019-03</u></p> <p>City Manager Joseph A. Valentine City of Birmingham 151 Martin Birmingham, MI 48009</p>		<p>A. Signature <u>[Signature]</u> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <u>C. Date of Delivery</u> <u>[Signature]</u> <u>5/20/19</u></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>																	
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<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																			

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt

151 Martin St.
Birmingham MI 48009

NOTICE OF HEARING BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-03 according to the attached complaint.

You are requested to appear at this hearing to be held on Tuesday, July 2, 2019 at 2:30 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009.

Please refer to the enclosed Ethics Ordinance and the Board of Ethics Procedural Rules.

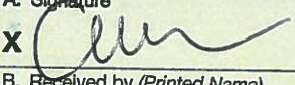

This hearing will be held in accordance with the Open Meetings Act.

[Signature]
J. Cherilynn Mynsberge
City Clerk

Enclosures

Mailed via certified mail May 17, 2019

People with disabilities needing accommodations for effective participation in this meeting should contact the city clerk's office at (248) 644-1800, ext. 282 (voice) or (248) 644-5115 (TDD) at least two days in advance to request mobility, visual, hearing or other assistance.

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY																	
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p style="text-align: center;">Clinton Baller 822 Shirley Road Birmingham, MI 48009</p>		<p>A. Signature X </p> <p>B. Received by (Printed Name) Clinton Baller</p> <p>C. Date of Delivery 5/22/19</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>																	
<p>2. Barcode</p>  <p>9590 9402 4648 8323 2629 83</p> <p>2019-03</p> <p>Article Number (Transfer from service label) 7017 2400 0000 1919 6977</p>		<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery</td> <td></td> </tr> </table>		<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery	
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Birmingham
le Community

Birmingham, MI 48009

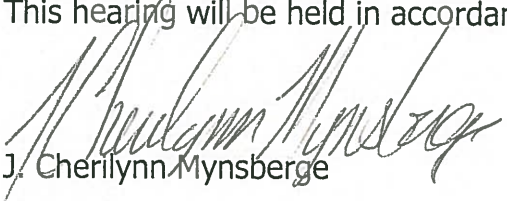
NOTICE OF HEARING BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-03 regarding City Manager Joseph A. Valentine.

The hearing will be held on Tuesday, July 2, 2019 at 2:30 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009.

Please refer to the enclosed Ethics Ordinance and the Board of Ethics Procedural Rules.

This hearing will be held in accordance with the Open Meetings Act.


J. Cherilynn Mynsberge

enclosures

Mailed via certified mail May 17, 2019

People with disabilities needing accommodations for effective participation in this meeting should contact the city clerk's office at (248) 644-1800, ext. 282 (voice) or (248) 644-5115 (TDD) at least two days in advance to request mobility, visual, hearing or other assistance.



Case No. **2019-04**
(Assigned by clerk)

ETHICS INCIDENT/COMPLAINT FORM

Any person who has a complaint against a city official or employee, as defined in the Code of Ethics, alleging that conduct of that official or employee is in breach of the code, may bring the matter before the Birmingham Board of Ethics by filing this form with the city clerk. Within seven days upon receipt of this filing, the clerk will set a hearing for this matter and notify the parties involved according to the ordinance.

All advisory opinions will be communicated to the city commission and will be published on the city's website at www.bhamgov.org.

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

1. Name the person alleged to have violated one or more provisions of the City of Birmingham's Ethics Ordinance (Chapter 2, Article IX), and provide the following information, if known. If you are alleging that more than one person may have violated the City of Birmingham's Ethics Ordinance, file a separate complaint form for each individual. The information on this form may be subject to disclosure under the Freedom of Information Act.

Mayor Patricia Bordman

2. Explain why you believe that the individual named above may have violated the City of Birmingham's Ethics Ordinance. Be as specific as possible as to dates, times, places, and actions. Attach additional sheets of paper if the space provided below is not sufficient. Also note which specific section in the ordinance was violated.

On April 22, Mayor Bordman voted to approve a Development Agreement with Woodward Bates Partners LLC. Subsequently, the mayor signed the agreement. The agreement contains the following provision:

2.2.5 Resolution Submitting Bond Proposal and Calling Election and Notice of Intent. The City Commission shall be asked to adopt a resolution with respect to the issuance of the Bonds and the scheduling of the Special Election for, among possible other matters, a public vote with respect thereto. Within ten (10) days following the City Commission's adoption of the foregoing resolution for the Special Election, Developer will pay to the City the sum of up to Twenty Thousand and 00/100 (\$20,000.00) Dollars in order to defray the cost of such special election.

On May 6, the Commission adopted the aforementioned resolution.

The actions, taken together, represent a violation of Birmingham's ethics ordinance, which provides:

Section 2.321: "City officials and employees are bound to observe in their official acts the highest standards of ethical conduct ... recognizing that their official conduct should be above reproach. ... All city officials and employees shall safeguard public confidence by ...avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution."

Futhermore, the ordinance provides that:

"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 ...

(3) Losing complete independence or impartiality of action...

or (5) Affecting adversely the confidence of the public or the integrity of the city government.

By accepting the offer of a private developer to defray the costs of a special election, Mayor Bordman has created the appearance that the city has lost complete independence or impartiality of action, and has adversely affected the confidence of the public in the integrity of city government.

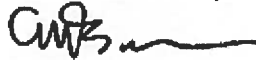
3. Attach or make reference to any document or other evidence that may support your allegations. Also provide the names and addresses (if known) of any witnesses or persons who may have knowledge of facts that support your allegations.

Both the Development Agreement and the resolution approving the special election are public documents readily available from the City Clerk.

4. Are you aware of any civil, criminal or administrative action pending that involves the same parties as alleged in this complaint which involves substantially the same subject matter? If so identify in detail.

No.

5. I declare that the foregoing information is true and accurate to the best of my knowledge.



5/10/2019

Your signature

Date

Clinton Baller

Your printed name

Address 822 Shirley Rd., Birmingham, MI 48009

(Number, Street, City, State, Zip)

Daytime Phone (248) 703-8365

Evening Phone ()

Email cmballer@visa-master.com

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

If you have questions about this form, or would like to request the form in an alternate format for the visually impaired, contact the Clerk's Office at 248.530-1880 or write us at the above address. We will take reasonable steps to accommodate your needs.

NOTE: Within seven days of receipt of this form, the Birmingham Ethics Board will set a date for hearing this matter. Any parties involved will be given 28 days notice to appear at the hearing.

Revised 8/16/12

FOR OFFICE USE ONLY

Accepted by C. Mynsberge

Date 5-16-2019

Sworn Statement of Patricia (Patty) Bordman

I, Patricia (Patty) Bordman, state that the following is true and based on personal knowledge or belief.

1. I have no financial or personal interest in: 1) the Boji Group, LLC, 2) Saroki Architecture, 3) Robertson Bros. Homes, 4) Walbridge Aldinger, or 5) any entity representing, hired by or connected to those entities, nor have I reason to believe or expect that I will derive monetary gain or suffer a direct monetary loss, by reason of any matters brought before the City Commission for decision regarding these entities.
2. I am not related by blood or marriage to: 1) Ron Boji, 2) Victor Saroki, 3) Paul C. Robertson, Jr., 4) John Rakolta, Jr., or 5) any person representing, hired by or connected to those persons. Indeed, to my knowledge and belief, I have no personal relationship with these individuals or any person representing, hired by or connected to those persons, other than having met them at City Commission meetings that are open to the public.
3. I have no financial or personal interest in the outcome of any matter currently before the city, nor am I associated in any way in any enterprise that will be affected by the outcome of any matter before the City Commission, including but not limited to the redevelopment of the North Old Woodward Parking Garage and surface lot (the Project).
4. I have not been offered, nor have I received, any money, property, thing of value or benefit by any person or entity in return for my vote on any matter, including, but not limited to the Project.
5. I have accrued no private gain in any form, whether directly or indirectly; no person or entity has offered any tangible or intangible personal benefit to me; nor have I solicited any gift or loan of money, goods, services or other thing of value for my benefit, my family's benefit or for the benefit of any organization in exchange for my decisions regarding any matter affecting the City of Birmingham, including but not limited to the Project or those identified in paragraphs 1 and 2.
6. With the sole exception of incidental interchanges that may have occurred in the course of City Commission meetings that were open to the public, I have had no electronic or written communications, private discussions or meetings with: 1) Ron Boji, 2) the Boji Group, LLC, 3) Victor Saroki, 4) Saroki Architecture, 5) Paul C. Robertson, Jr., 6) Robertson Bros. Homes, 7) John Rakolta, Jr., 8) Walbridge Aldinger, or 9) any person or entity representing, hired by or connected to those persons or entities named in this paragraph, regarding any matters, including, but not limited to the RFP for the concept plan to redevelop the North Old Woodward Parking Garage and surface lot, the contours of the concept plan, the RFQ for the Project, the RFP for the Project, the Development Agreement, the Authorizing Resolution for the parking structure bond proposal and ballot language for the August 6, 2019, referendum or any other matter.
7. At all times, I have made decisions regarding all city matters at City Commission meetings that are open to the public.
8. I have not participated in the negotiation of any contracts between the City of Birmingham and any business entity, including but not limited to all aspects of the Project or those entities identified in paragraph 1.
9. I have never used, or attempted to use, my positions as Commissioner or Mayor to secure, request or grant any special consideration, privilege, exemption, advantage, contract or preferential treatment for myself, my family or others, including but not limited to those identified in paragraphs 1 and 2.



10. The City of Birmingham has engaged the law firm of Beier, Howlett, and in particular, attorney Tim Currier, as City Attorney.

11. According to the Beier Howlett website, Attorney Currier has been Chief Executive Officer of the firm from 1995-present, and "is recognized as one of the leading experts in [] municipal law in the State of Michigan." In addition, the Beier Howlett website states that Attorney Currier is ethics counsel to the Wayne County Airport Authority, and "holds the prestigious honor of being named Distinguished Municipal Attorney of the Year in 2012 by the Michigan Association of Municipal Attorneys." He was also named "Lawyer of the Year" in 2015 by Best Lawyers in America; selected as a member of Leading Lawyers and a part of the Leading Lawyers Advisory Board, 2014; 2015 "Lawyer of the Year" in Municipal Law and Municipal Litigation by Best Lawyers; Best Lawyers in America, 2010-Present; Michigan Super Lawyer, 2006-Present; dbusiness Top Lawyers; Financial Regulatory Authority (FINRA), Arbitrator." In other words, Attorney Currier is an expert in municipal law, including ethics ordinances.

12. On information and belief, City Attorney Currier drafted the City of Birmingham's Ethics Ordinance.

13. The City of Birmingham engaged the law firm of Miller Canfield, and specifically attorney Joe Fazio of that law firm, to conduct negotiations on behalf of the City of Birmingham with legal representatives of Woodward Bates Partners, LLC, regarding the Project.

14. According to the Miller Canfield website, Attorney Fazio is a principal of the law firm, managing director and real estate deputy group leader. The Miller Canfield website further states that Attorney Fazio's "specific areas of expertise include complex commercial real estate acquisitions and developments, with extensive experience in ground leasing [] and public/private development agreements, as well as conventional, securitized and tax-increment financing." In other words, Attorney Fazio is an expert in the type of legal representation required by the Project.

15. On information and belief, in the course of said negotiations, Attorney Fazio and legal representatives of Woodward Bates Partners, LLC, agreed on the terms of the Development Agreement that is the subject of Ethics Complaint, Case No. 2019-04.

16. Having drafted the Ethics Ordinance, City Attorney Currier has intimate knowledge of the provisions of the Ethics Ordinance, and would, therefore, be aware of any provisions of the Development Agreement that violated the Ethics Ordinance. As a City Commissioner and Mayor, I rely on Attorney Currier to advise me of any provisions of any contract that violate Birmingham's Ethics Ordinance.

17. On information and belief, prior to its presentation to the City Commission, City Attorney Currier reviewed and vetted said Development Agreement on behalf of the City of Birmingham and the City Commission.

18. City Attorney Currier did not advise me, and to my knowledge and belief did not advise any City Commissioner, that any provision(s) of the Development Agreement violated the Ethics Ordinance.

19. The specific provision of the Development Agreement at issue in Ethics Complaint, Case No. 2019-04, is paragraph 2.2.5, wherein Woodward Bates Partners, LLC, agrees as part of its obligations under the private-public partnership with the City of Birmingham to defray the cost of a special election regarding a bond proposal. This agreement is a public benefit for the City's residents since their taxpayer funds will not be used for the special election. Furthermore, Woodward Bates Partners, LLC, is required to pay these costs regardless of the outcome of the election: Woodward Bates Partners, LLC, will not receive a refund whether the bond proposal passes or fails.

20. On April 22, 2019, at a regularly scheduled Birmingham City Commission meeting, Attorney Fazio presented, nearly page by page, the Development Agreement to the City Commission, including paragraph 2.2.5 which is the subject of the Ethics Complaint.

21. At no time during his presentation did Attorney Fazio advise the Birmingham City Commissioners that any provision of the Development Agreement violated the City's Ethics Ordinance, or was improper in any way.

22. Each Mayor of Birmingham is selected by a vote of the commissioners, not by a vote of the residents. The mayor has no powers beyond those of the other six Commissioners: the mayor cannot veto a resolution; cannot break tie votes; and the mayor's vote counts equally to each of the other six individual Commissioners' votes. See below, City of Birmingham Charter Section 5 regarding the mayor's powers:

Section 5. - [Mayor; selection, powers.]

On the second Monday in November of each year, the commission shall meet at the usual place for holding the meetings of the legislative body of the city for the purpose of organization. At each of said organization meetings the commission shall elect one of its members as mayor who shall be the presiding officer of the commission and chief executive head of the city and who shall have such other powers and perform such other duties as are or may be imposed or authorized by the laws of the state, by this Charter or by the commission. He shall be the conservator of the peace and may exercise within the city the powers conferred upon sheriffs to suppress disorder. At each of said organization meetings the commission shall also elect another member of the commission as mayor pro tem, who during the mayor's absence or disability to perform his duties, shall act in his stead and shall during the time of said absence or disability exercise all of the duties and possess all of the powers of the mayor. In the absence or disability of the mayor pro tem, the commission may temporarily appoint one of its members to that office. The mayor as a member of the commission shall have the right to vote on all matters before the commission and shall possess all of the other rights and powers of members of that body. He shall not have the right to veto.

23. In fact, as the Birmingham Mayor selected by the other Commissioners, I have no authority to sign any contract on behalf of the City of Birmingham, including the Development Agreement, without a public vote by a majority of the City Commissioners expressly authorizing me to sign a specific contract. Moreover, even if I vote against a specific contract, I am required to sign said contract if the majority of the City Commissioners vote in favor of that contract, and authorize me to do so.

24. Because I have no independent authority as the Birmingham Mayor, signing any contract on behalf of the City of Birmingham is merely a ministerial task.

25. On April 22, 2019, the City Commission passed the following: "Resolution approving the Development Agreement between the City and Woodward Bates Partners, LLC, and further, authorizing the Mayor and City Clerk to sign the agreement on behalf of the City."

26. Mayor Pro Tem Pierre Boutros, Commissioner and former Mayor Mark Nikita, Commissioner and former Mayor Stuart Sherman, Commissioner and former Mayor Andy Harris each voted in favor of the Development Agreement containing paragraph 2.2.5, and voted to authorize me, as Mayor to sign the Development Agreement.

27. Because the majority of the City Commissioners voted in favor of the Development Agreement and authorized the Mayor to sign same, a finding by the Ethics Board that such vote and authorization constitutes a violation of the Ethics Ordinance would have to be found against each individual commissioner who voted in favor, including Mayor Pro Tem Pierre Boutros, Commissioner and former Mayor Mark Nikita, Commissioner and former Mayor Stuart Sherman, Commissioner and former Mayor Andy Harris and Commissioner and Mayor Patty Bordman.

28. Clinton Baller has been publicly speaking out against the selection of Woodward Bates Partners, LLC, and the Project. Mr. Baller has stated that he favors the TIR group's proposal. See Attachment A.

29. On April 1, 2019, Clinton Baller emailed to me a veiled threat to defeat my future candidacy for the City Commission if I vote in favor of the Project. See Attachment B.

30. On April 22, 2019, following my vote in favor of the Development Agreement, and after the meeting was adjourned, Clinton Baller threatened to "get me" which I took to mean that he would work to defeat my future candidacy should I run for reelection in 2019. Clinton Baller must have appeared to be physically threatening me as Police Chief Mark Clemence insisted on accompanying me to my car that evening, and he did so.

31. By filing this Ethics Complaint against me, alone, instead against each of the other individual City Commissioners who voted in favor of the Development Agreement, I believe that Clinton Baller is furthering his threat to defeat my candidacy by claiming that I violated the Ethics Ordinance, and that he is also attempting to coerce me to vote against the Project.

32. No Birmingham City Commissioner, Birmingham City staff member, Birmingham City Attorney, or any person or entity named in paragraphs 1 or 2, or anyone else has tried to influence my decisions with regard to the Project, including but not limited to the selection of the development group or agreements brought before the City Commission.

33. At all times, I have considered and will continue to consider the best interests of the City of Birmingham as a whole with regard to all matters, including but not limited to, the Project, and without regard to threats against me, whether veiled or not.

Patricia (Patty) Bordman

Patricia (Patty) Bordman
1091 Lake Park Dr.
Birmingham, Michigan 48009

Signed and sworn to before me on 23rd day of May, 2019.

[Notary Seal:]

Cynthia A. Walters

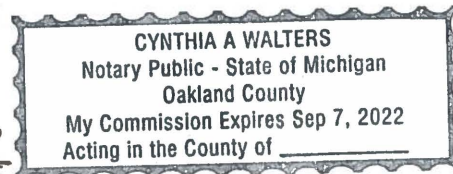
[signature of Notary]

CYNTHIA A. WALTERS

[typed name of Notary]

NOTARY PUBLIC

My commission expires: 9-7, 2022





From: Clinton Baller cmballer@avidpays.com
Subject: Proposed development agreement meeting

Date: February 20, 2019 at 11:29 AM

To: Joe Valentine jvalentine@bhamgov.org

Cc: mark@archiveds.com, Rackeline Hoff rackyhoff@hotmail.com, stuartsherman stuart.sherman@sbcglobal.net, Carroll DeWeese carrolldeweese@comcast.net, Harris, Andrew andrew.harris@kitch.com, Patricia Bordman pattybordman@gmail.com, pboutros@onecareltc.com

CB

Joe,

I regret that I will be out of town and unable to attend the March 9 meeting about the Bates St. extension. Please make this comment part of the package.

I have been an aggressive advocate of redeveloping the Bates St. site for many years. I have stood atop the Old Woodward parking structure many times and imagined what might be done with the property. I always hoped that Birmingham, the home of many creative and intelligent people, would manage to do the right thing. The recruitment of some of our best and brightest to lead an international design competition was one not-so-outlandish thought.

Sadly, the process that has unfolded has been shocking to me in its incompetence. The lawsuit you now face is just one symptom of a process flawed since Day One. The city failed to appoint an expert panel to help guide the process, and instead relied on an ad-hoc committee of amateurs. The resident member intended to have commercial development background had no relevant experience, and at least one member, City Commissioner Rackeline Hoff, repeatedly (and accurately and presciently) questioned whether the committee was over-reaching its charter. Now it faces credible accusations of inside dealing and conflicts of interest.

The refusal to work with, and then summarily dismiss, one of the world's foremost architectural firms, Robert A.M. Stern Architects, was shameful.

City officials should think carefully about how they proceed and the likelihood of success given the circumstances. If any aspect of this embarrassment comes to a vote, the under-powered steamroller you are driving will, I assure you, encounter an immovable object.

My suggestion: Return to Go. Do not collect \$200.

Clinton Baller
388 Greenwood

3/19/2019
Nextdoor.
com

If you live in Birmingham, you cannot afford not to read this

The City of Birmingham, as part of an effort to secure more parking for the downtown, has embarked on a major redevelopment project that will impact every resident and taxpayer in the city. Birmingham residents need to understand this project: how it evolved, and how it will impact their daily lives and the vitality of the city, and how much it might ultimately cost the...

The City Commission has scheduled a meeting to discuss the project at 5 p.m., Tuesday, March 26, at City Hall. It is important that the Commission hear from concerned citizens. And if you are a resident, taxpayer or voter in the city, you should be concerned.

You can read about the project in a variety of places. Downtown magazine is a reliable source and its most recent story from the print version is here:

<https://www.downtownpublications.com/single-post/2019/02/15/Next-step-approved-on-Woodward-Bates-project>.

Just this week, Downtown posted an article online about a lawsuit the project has spawned, and you can read about that here: <https://www.downtownpublications.com/single-post/2019/03/15/Birmingham-responds-to-Bates-Street-project-suit>.

I have shared my opinions about this elsewhere on Nextdoor --

https://nextdoor.com/news_feed/?post=105160310&comment=241627943 -- and in letters to the editors of several local publications. I am a 40-year resident of Birmingham, a former professional journalist, a longtime observer of city government, and for several years in the early 2000s I edited the Birmingham Buzz, an influential blog that successfully sought a change in city leadership and spearheaded such projects as the redevelopment of Booth Park and the enactment of the city's Bistro Ordinance.

I encourage you to read on, and to read my opinion piece linked above.

I have serious questions and concerns about this project, and regret that I will not be able to attend Tuesday's meeting. Whether or not you agree with me on this or other topics, these questions are important:

* The city is planning to undertake a major revision to its master plan, but has chosen to move forward with this project in advance of that planning process. Prior master plans were extraordinary in the extent to which they included stakeholders. Why has this plan gone ahead without such input? Why isn't it being included in the master planning process? What's the rush?

* What sort of additional residential or commercial development does the city want or need downtown? How does this project satisfy those needs? What sort of density of development

is appropriate? Were these questions asked and answered by the city officials who have so far driven this plan? Would they be addressed in a master plan?

* The city is moving forward with a public/private partnership, yet it has no experience with such arrangements, and hired an expert in such deals only after it had decided on a private development partner. Why didn't the city engage an expert at the outset?

* Little to no negotiation with the chosen partner (or any other potential partner) occurred prior to the choice of a partner. Given that the city may (or may not) have to put up millions of dollars for parking and other infrastructure improvements, why didn't it negotiate with potential partners prior to choosing one?

* The major driving forces behind this plan were an ad hoc committee; one of its members, City Commissioner Mark Nickita, and City Manager Joe Valentine. We know that one of the committee members intended to be a resident with commercial development experience (former City Commissioner Gordon Rinschler) had no such experience. We know that Commissioner Nickita has relevant city planning experience, but also tends to dominate committees and discussions of which he is a part. And we know that City Manager Valentine, though a strong administrator who watches the numbers closely and professes to be dedicated to "process," lacks vision and aesthetic sense. He also tends to steamroll people, including some staff at City Hall, where morale has suffered under his leadership. Why have key staff members at City Hall, including Planning Director Jana Ecker, essentially been sidelined from this project? Why did Nickita bypass a planning process that for any other city he would have endorsed? Why wasn't a blue-ribbon panel appointed to guide the project? Why did a member of the ad hoc committee, City Commissioner Rackeline Hoff, repeatedly question whether the committee was overreaching its charter? Why didn't the city conduct a design competition to solicit ideas on what is, unarguably, the most valuable and important piece of undeveloped property the city owns?

* Why are the city, Nickita and Valentine being sued? Is it merely sour grapes on the part of the developer who was not chosen? Or does that developer make legitimate charges of inside dealing and conflicts of interest? Could the city have avoided a lawsuit by dotting all its I's and crossing all its T's?

* One of the world's foremost architectural firms, Robert A.M. Stern Architects, was involved in one of the development proposals. The city hardly engaged with them. Why? Why didn't city officials take sufficient advantage of the opportunity to work with Stern, even if it ultimately decided to go with another proposal? What sort of ideas could we have gleaned from Stern?

* What about the development that was chosen? How refined are the plans? How do they meet the needs of the city? How were those needs defined? What is the retail component, and will it improve or diminish the retail environment in Birmingham? How much "affordable" housing is included? Will it accommodate full-time residents of modest means, or are we building more million-dollar condos for wealthy snowbirds? How many alternative designs were considered? Why was this one chosen? Was it chosen because the city concluded it was

the best design it could obtain? What about potential tax and parking revenue from this or alternative designs, and its usefulness in negotiating the best deal?

* Will any part of this project require voter approval? With or without a vote, how confident are City Commissioners that residents will endorse the process and the project that is unfolding?

As my opinion piece notes, while I am supportive of developing this property, I have concluded that the process was flawed, the project doesn't meet the needs of the city, and that the whole thing should be called off. The city should go back to Square One; include the development in the upcoming master planning process; engage an expert in public/private partnerships, and then conduct an international design competition for a development worthy of Birmingham and the unique piece of property it owns on the Rouge.

MARCH 31,
2019
NEXTDOOR,
COM

For city non-planners, this project is all about parking, and they did a lousy job of getting more parking out of it. The numbers are ridiculous. See my earlier post. A good deal of the new parking will be consumed by the new development itself. Our city non-planners have been very clear that they couldn't care less what goes on the rest of the site. (Did they ask you?)

Parking on that site belongs underground. Once upon a time we had a city manager named Tom Markus who had vision and knew precisely that. He'd be shocked to see what's transpired. (Hmmm, maybe a topic for my next post?)

As proposed, the parking component overwhelms the site, and the non-planners are planning crazy traffic jams by putting 100% of the parking access (in and out) on the "windswept canyon" (apologies to Russ Dixon) that will be Bates, and none off of Willits or N. Old Woodward. Parking actually belongs in the Triangle District, which sits idle within easy walking distance for 99% of downtown workers. But that would involve actual planning, and an ability to drive a public/private partnership, not sit sheepishly in the backseat and put a known opportunist, Ron Boji, in the drivers' seat.

There are a couple of things the city is saying that you should be skeptical about.

The first is that the parking deck on Bates will "pay for itself," or be supported by the parking system. WE OWN THE PARKING SYSTEM, so the money is coming out of our left pocket instead of our right one. And if we are going to spend \$60 million plus interest on a parking deck, why do we need the additional development? The idea, which seems to have been lost on the city's non-planners, is that if you bring in the developers, THEY should pay for the parking, not us.

The second thing you want to be skeptical about are claims by the city that the upcoming master planning process is going to be "comprehensive." We can only hope that claims in the city's most recent newsletter by City Manager Joe Valentine play out. I've heard something completely different: That the professional planners we need for Bates, the Triangle and all of Birmingham are being told to focus almost solely on the neighborhoods. The neighborhoods certainly need attention, but the issues are predictable and mostly easily dealt with: big-foot homes, cut-through traffic and commercial encroachment.

Anybody watching these threads about Bates, even with only one eye, need to keep the other eye on the "comprehensive" master plan that's coming up.

other eyes on the comprehensive master plan that's coming up.

Paul, you have some interesting alternative ideas for this site. I'm with Roger, in the strange position of agreeing with you on this. And anyone who knows us and our past knows that if we agree on something, there must be merit in the position.

For our commissioners, supporting the Bates deal is POLITICAL SUICIDE, and they need to be very careful about how they approach the planning process overall, because a lot of people are now paying attention.

With further apologies, this time to Bill Clinton, "IT'S THE MASTER PLAN, STUPID!"

From: Clinton Baller cmballer@avidpays.com

Subject: Re: Bates parking

Date: April 12, 2019 at 2:43 PM

To: Joe Valentine jvalentine@bhamgov.org

Cc: Mark Nickita marknarchive@yahoo.com, Rackeline Hoff rackyhoff@hotmail.com, Carroll DeWeese carrolldeweese@comcast.net, Andy Harris Andrew.Harris@kitch.com, Patty Bordman pattybordman@gmail.com, Pierre Boutros pierre@millspharmacy.com, Stuart Sherman stuart.sherman@sbcglobal.net

CB

Joe,

Thanks for your reply. I know you are busy, and I appreciate you taking the time.

I was looking for a few numbers that you have not yet provided. How much onsite parking (aside from the structure) would be included in the new development? What is the total demand that the new development will create? And how was that demand calculated? You know I will take issue with the one-space-per-564-square-feet-of-office contained in the RFP, as any reasonable person who has observed Shift Digital would. But we can deal with that disagreement later.

To stick with parking for moment, as that's what is driving this development, I think you make a good point that the structure is old and would need to be either replaced or maintained. And that needs to be part of the calculus, no doubt. You want to be careful, however, about calling me "disingenuous," as that will come back to bite you momentarily. I would argue that while the city needs parking, it doesn't necessarily need to be in the quantity and form proposed for this specific site. I would put as much as possible underground, and then look elsewhere to fill in the gaps. As you know, I think the Triangle is a great place to look, and downtown office workers, given enough incentive, will walk a few extra blocks. Making them walk across Woodward would have the added benefit of activating the district and putting much-needed feet on the street, which might calm traffic and help better connect east and west. I'm not against investing in parking infrastructure, I just think it needs to be done with lots of thought.

Which brings me to what you and others really need to hear, which are the myriad reasons for opposition to the project. Back in 2001, when I started the Buzz, one of the first guys I drew out of the woodwork was Paul Reagan. We haven't agreed on anything for a long, long time — 18 years to be exact. But in a strange twist of fate, he and I have joined forces on this one. We might not agree on what ultimately should happen with the Bates site, but we agree on all the points I am about to make. A lot of people know us and can correctly assume that if we agree, there is merit.

For the life of us, we can't figure out why the city is moving ahead with it so quickly and single-mindedly and without benefit of the careful planning Birmingham is known for. For goodness sakes, man, Andres Duany is packing his bags as we speak to come here and revise our master plan! Yet the city prefers that he not get involved in the Bates project?! You want to talk "disingenuous?" Hiring Duany and then telling him to lay off Bates is the very definition. Sidelining Jana and the Planning Board is "disingenuous." Accepting me and Linda Taubman as the sum total of public input at a few ill-timed meetings was "disingenuous." And claiming that taxpayers will bear no burden with a \$55 million-plus bond issue is "disingenuous."

The project, as it has been managed so far, has been a classic case of the tail wagging the dog. But Birmingham residents know the value of the Bates site, and the careful planning it demands. The question they want answered is: What is best for this prime piece of property and the public that owns it?

But, of course, that was never a question for the Ad Hoc Parking Development Committee? By the way, your "resident with commercial development experience" in a town chock-full of

resident developers? That was disingenuous!

There are so many reasons to put the brakes on this. How about the lawsuit? It's a sideshow, yes, but one that highlights ineptitude and an ethical vacuum. TIR should add to the list of counts failing to recognize the value of input from Robert A.M. Stern Architects.

And then there's the threat of opportunism. Many of us have read about Warren and Royal Oak and the Michigan State Senate, and see Birmingham with a big red "X" on its chest. The city picked Woodward/Bates, and accepted most of what it had to offer, before hiring a P3 expert, and without attempting to negotiate a single point with anyone. I can see Ron Boji chuckling to himself as he buys a roomful of P3 conference attendees a round of drinks. Meanwhile, Birmingham residents have been invited to hear the commission discuss a potential development agreement that no one in the public has seen!

For the record, and as a preview of what I will say to the commission on Monday night (and at the risk of repeating myself), here are the major points of contention, any one of which would be cause for a do-over:

- * The Planning process was flawed. It was driven by amateurs who were in over their heads. Residents, the city's planning apparatus, Andres Duany & Co., and the wider world have been excluded from what should have been an open and thorough vetting of ideas. To the extent that any overarching "program" exists, it is parking and parking alone. It is not acceptable that Woodward/Bates decides how much commercial, retail and residential development occurs, and what is left over for the public.

- * The RFP used to attract developers was fatally flawed -- grossly ambiguous and legally tenuous. In violation of widely accepted norms of public bidding, a party that had participated in the preparation of the RFP was not only permitted to respond to it, but is on track to be awarded the project!

- * The city has decided to work with a group whose P3 expert has been accused repeatedly of opportunism. The city, on the other hand, failed to engage competent counsel at the outset, and waited until it had chosen a development partner and agreed to the broad outlines of a deal. It made no attempts to negotiate with any developers prior to choosing a partner, nor to ascertain whether and how a developer might bear a substantial portion of the cost the city is now agreeing to absorb.

- * The city has failed to so far provide hard and accurate numbers about the parking demand that would be created by the new development. The project team is almost surely underestimating the amount of parking required, and therefore overestimating the amount of additional net new parking that would result. The cost, no matter how you slice it, would be astronomical, in terms of money spent, land surrendered and opportunities lost. Residents and city coffers would gain very little in return for the investment of \$55 million or more, plus interest, leaving residents scratching their heads and wondering who, exactly, benefits.

As of now, the buck stops with our City Commissioners. They will feel backlash not only from those directly affected such Linda Taubman and the residents of Warren Ct. and the Willits, but from members of the public-at-large as varied as Clinton Baller and Paul Reagan. The commission needs to order a do-over. If it doesn't, and decides unwisely to move forward, the buck will stop with voters, who one way or another will then have the ultimate say.

Clinton

On Thu, Apr 11, 2019 at 4:26 PM Joe Valentine <Jvalentine@bhamgov.org> wrote:
Clinton,

I appreciate your effort to obtain clarity on the parking count. As there is not an approved site plan at this stage, the following numbers are representative of what the proposed plan anticipates at this point.

The actual number of existing parking spaces for the North Old Woodward parking structure and surface parking lot is 745. The additional spaces identified by the parking study is 278 for the area north of Maple. The target number is 1023. For the RFP, we increased this number to 1150 realizing there is an opportunity for additional parking at this location and the new development would require parking as well. The current number for the new proposed parking structure is 1260. There are also 9 on street parking spaces. The total number of public parking spaces on site is 1269. This is an addition of 524 spaces over what exists today (745). The new development being proposed would provide on site parking, but under the current plan would need about 120 spaces in the parking structure since it is in the parking assessment district like other commercial sites. The net gain of new parking spaces under the new parking structure project would be about 404.

I know you were out of town and unable to attend the March 26th meeting, but I would invite you to review the meeting if you haven't already as there was a lot of information on the need to replace the North Old Woodward structure which is the oldest in the City. It was built in 1966. Regardless of what happens with the DB 2016 Master Plan elements, this structure is reaching the end of its life cycle and will need to be replaced. If it is being suggested that the cost to replace this structure should only be applied to the amount of the new parking spaces over what exists today, I would have to say this is disingenuous as the entire structure will need replacement and the cost to replace the entire structure is a real cost and should be acknowledged.

If you have any questions, just let me know.

Regards,
Joe

On Tue, Apr 2, 2019 at 10:05 AM Clinton Baller <cmballer@avidpays.com> wrote:
Joe,

I would like some input from you regarding the calculation of additional net public parking on the Bates project. I've done some rough back-of-the-envelope calculations, which you may have seen on Nextdoor. But with the intense public attention this project is getting, I think it makes sense to be absolutely clear and hopefully in agreement.

When I say "additional net public parking" I mean the difference between what we have now and what we will have after the project, taking into account the load that the new development will place on the parking system.

The calculation of that additional load, of course, is where we might find some disagreement. If you go by the standard of one space for every 564 square feet of office space contained in the RFP, for example, you are going to get some disagreement. Also, if you leave out the standard for restaurants of one space for every 75 square feet, you might get some pushback. If you do stick with that 564 square foot standard then I think it

warrants some justification. The standard, I think, ought to be determined by looking at half a dozen modern office uses downtown (McCann, Shift Digital, etc.) and see what their loads are.

So I would just ask you to fill in the blanks of the following equation, with footnotes on how the load of the new development has been calculated:

_____ Total spaces in proposed development

- _____ Less load of new development

- _____ Less # existing spaces today

= _____ Equals additional net public parking

Fair enough?

Clint Baller

\

--

Joseph A. Valentine

City Manager

City of Birmingham

151 Martin Street

Birmingham, MI 48009

(248) 530-1809 Office Direct

(248) 530-1109 Fax

jvalentine@bhamgov.org

Twitter: @JoeValentine151

To get the latest information regarding the City of Birmingham, please sign up for our communication tools by clicking here www.bit.ly/bhamnews.

MAY 4, 2019
NEXT DOOR.
COM

Unless you pay exceedingly close attention to Birmingham City Hall, you probably missed the fact that Robert A.M. Stern, a world-renowned architect, has been commissioned to design a major redevelopment in town. You probably also missed the fact that his proposal has been, in effect, summarily dismissed by an ad hoc committee that has gotten in a bit over its head.

Long story short: The Birmingham City Commission, having decided that the city has a parking shortage that needs to be addressed, appointed an ad hoc committee to figure out what to do about it. The result was an RFP seeking redevelopment proposals for the four acres that contain the N. Old Woodward parking structure and the surface parking lot across from the Willits building. The RFP was ambiguous about design constraints, and the committee received two drastically different proposals. One, from local architect Victor Saroki and a team of southeast Michigan developers, sticks roughly to the design standards of the rest of downtown -- buildings of no more than five stories and mostly above-ground parking. It is boring.

The other, from a team led by local jeweler and developer Ara Darakjian that hired Stern, proposes some decidedly outside-the-box ideas, including lots of underground parking, a 15-story tower of relatively affordable units and a ton of new retail space. It would bring a residential and retail density that our downtown sorely needs. It is exciting.

There is a lot of good news here, and a bit of bad.

The biggest piece of bad news is that the ad hoc committee is in over its head, and on Wednesday decided prematurely to recommend the Saroki team to the City Commission. The good news is that it seems to realize it needs some help, and has recommended that the City Commission hire a consultant. The other good news is that the City Commission is likely to defer a decision on a development team until it gathers more information. The Commission has a long history of ignoring even its standing committees.

The other piece of bad news is that the city seems, deliberately or not, to be suppressing news about these proposals. Just this week, it issued an "Around Town" newsletter that included 17 headlines and a 20-minute video from City Manager Joe Valentine, with no mention whatsoever of the Bates St. proposals. All of three residents showed up Wednesday to comment on the proposals. Google Robert A.M. Stern. Then navigate the city's website to the agendas of the Ad Hoc Parking Development Committee, and click on the agenda for Feb. 9. (Or just click here: <https://goo.gl/BYn9tJ>.) Look it all over, then tell me it wasn't worth a headline in the city's newsletter.

The bottom line here, for now, is that the Stern proposal raises some really good questions about the direction in which Birmingham should be heading -- questions that the entire community, led by our City Commission and our planning experts, ought to be involved in

answering. What sort of density and housing do we want or need downtown? What kind of retail environment do we want? What kind of investment is required for what kind of return? These are master planning issues that need a lot more attention than an ad hoc committee can provide. More good news: The city is about to embark on a new master plan, one that is likely to include Andres Duany, who wrote our 2016 Plan and who, reportedly, reacted favorably to the Stern plan.

Without question, these four acres are underutilized and packed with potential. It is far too soon to dismiss the Stern proposal and the ideas it embodies.



B

From: Clinton Baller cmballer@avidpays.com
Subject: Re: If we don't own cars, what will happen to demand for parking?
Date: April 1, 2019 at 1:25 PM
To: Patricia Bordman pattybordman@gmail.com

CB

Patricia,

You are welcome. It is a side issue. The most important points have been outlined by me and others on Nextdoor. I hope and will assume you are reading. But I want to assure you personally that I and others representing a broad range of Birmingham voters will aggressively oppose this development and any vote concerning it. I also suspect the community will consider the judgment of every commissioner on this single issue -- a litmus test, if you will -- come re-election time.

Respectfully,

Clinton Baller

On Sun, Mar 24, 2019 at 6:25 PM Patricia Bordman <pattybordman@gmail.com> wrote:

Dear Clinton,
That you for sharing this article.
Patty

On Mar 23, 2019, at 11:58 AM, Clinton Baller <cmballer@avidpays.com> wrote:

<https://www.nytimes.com/2019/03/22/opinion/end-of-cars-uber-lyft.html>

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PS Form 3800, April 2015 PSN 7530-02-000-9047

of Birmingham
A Walkable Community

2019-04
Mayor Patty Bordman
1091 Lake Park
Birmingham, MI 48009

Birmingham MI 48009

RE: Ethics Complaint 2019-04 Bordman

Mayor Bordman:

Your waiver of the 28-day notice provision of the Board of Ethics Procedural Rules, Chapter 3 Procedure for Resolving Complaints, is granted. Therefore, I am supplying you with the following notice of the rescheduled hearing date on the above captioned complaint.

REVISED NOTICE OF HEARING
BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-04.

The hearing, originally scheduled for Tuesday, July 2, 2019 at 2:30 p.m., has been rescheduled. The hearing will now be held on Wednesday, June 12, 2019 at 3:00 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009. You are requested to appear at this hearing.

This hearing will be held in accordance with the Open Meetings Act.

If you have any questions, please feel free to contact me.


J. Cherilynn Mynsberge
City Clerk

Enclosures

Mailed via certified mail May 31, 2019

Ethics Complaint Waiver

1 message

Patty Bordman <pbordman@bhamgov.org>

To: Cherilynn Mynsberge <cmynsberge@bhamgov.org>

Mon, May 20, 2019 at 5:44 PM

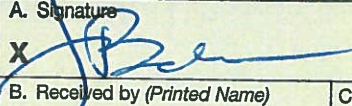
Cc: Joe Valentine <jvalentine@bhamgov.org>, Timothy Currier <tcurrier@bhlaw.us.com>

Hi Cherilynn,

I write to advise that I waive the Notice period for the hearing on Ethics Complaint, Case No. 2019-04, and request a hearing as soon as it can be arranged. I am available most days and evenings.

Thank you,

Patty Bordman

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>2019-04</p> <p>Clinton Baller 822 Shirley Road Birmingham, MI 48009</p> <p>9590 9402 4648 8323 2629 45</p> <p>7017 2400 0000 1919 6984</p>		<p>A. Signature X </p> <p><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name)</p> <p>C. Date of Delivery 6-4-19</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery</p> <p><input checked="" type="checkbox"/> Certified Mail®</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery</p> <p><input type="checkbox"/> Collect on Delivery</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery</p> <p><input type="checkbox"/> Insured Mail</p> <p><input type="checkbox"/> Insured Mail Restricted Delivery</p>		<p><input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Registered Mail™</p> <p><input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Signature Confirmation Restricted Delivery</p>	

PS Form 3811, July 2015 PSN 7530-02-000-9000

Domestic Return Receipt

ham
Community

822 Shirley Road
Birmingham, MI 48009

RE: Ethics Complaint 2019-04 Bordman

Mr. Baller:

Mayor Patty Bordman has waived the 28-day notice provision of the Board of Ethics Procedural Rules, Chapter 3 Procedure for Resolving Complaints, a copy of which has been previously provided to you. A copy of Mayor Bordman's waiver is enclosed.

I therefore supply you with the following notice of the rescheduled hearing date on the above captioned complaint.

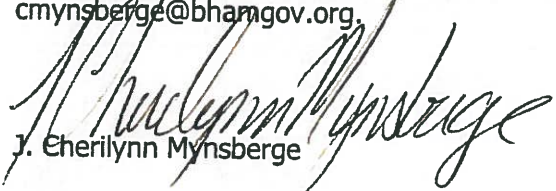
REVISED NOTICE OF HEARING BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-04 regarding Mayor Patty Bordman.

The hearing, originally scheduled for Tuesday, July 2, 2019 at 2:30 p.m., has been rescheduled. The hearing will now be held on Wednesday, June 12, 2019 at 3:00 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009.

This hearing will be held in accordance with the Open Meetings Act.

If you have any questions, please feel free to contact me at 248-530-1802 or at cmynsberge@bhamgov.org.


J. Cherilyn Mynsberge

enclosures

Emailed to cmballer@visamaster.com May 31, 2019
Mailed via certified mail May 31, 2019

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2019-04

Mayor Patty Bordman
1091 Lake Park
Birmingham, MI 48009

See for Instructions

of Birmingham
A Walkable Community

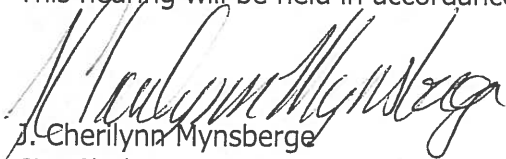
NOTICE OF HEARING
BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-04 according to the attached complaint.

You are requested to appear at this hearing to be held on Tuesday, July 2, 2019 at 2:30 p.m. in Room 202/203 of the Municipal Building at 151 Martin, Birmingham, Michigan 48009.

Please refer to the enclosed Ethics Ordinance and the Board of Ethics Procedural Rules.

This hearing will be held in accordance with the Open Meetings Act.


J. Cherilynn Mynsberge
City Clerk

Enclosures

Mailed via certified mail May 17, 2019

People with disabilities needing accommodations for effective participation in this meeting should contact the city clerk's office at (248) 644-1800, ext. 282 (voice) or (248) 644-5115 (TDD) at least two days in advance to request mobility, visual, hearing or other assistance.

SENDER: COMPLETE THIS SECTION

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Clinton Baller
822 Shirley Road
Birmingham, MI 48009



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PS Form 3811, July 2015 PSN 7530-02-000-9053

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Birmingham, MI 48009

NOTICE OF HEARING BOARD OF ETHICS

In accordance with Article IX.-Ethics, Section 2-325 (B) (1) of the Birmingham Code of Ordinances, the City of Birmingham Board of Ethics has scheduled a hearing for Complaint Number 2019-04 regarding Mayor Patty Bordman.

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Please refer to the enclosed Ethics Ordinance and the Board of Ethics Procedural Rules.

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J. Cherilyn Mynsberge
J. Cherilyn Mynsberge

enclosures

Mailed via certified mail May 17, 2019

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ETHICS ORDINANCE

ARTICLE IX. - ETHICS^[9]

Footnotes:

--- (9) ---

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

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

- 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)



BOARD OF ETHICS PROCEDURAL RULES

Chapter 1. Policy and Construction.

Rule 101. Intent.

The City of Birmingham Board of Ethics (the board) promulgates these rules pursuant to the City of Birmingham's Code of Ethics with the intent of realizing the policies and goals set forth in that code and in the board's own mission statement. The board intends to conduct its business consistent with all applicable federal, state and local laws.

Rule 102. Construction.

These rules are to be construed to achieve the timely, efficient and cost-effective determination of matters brought before the board.

Rule 103. The board may modify these rules on a case-by-case basis to further this policy.

Chapter 2. Procedure for Obtaining Advisory Opinions.

The rules of this chapter apply to the situation where 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"), requests 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."

Rule 201. Request for Advisory Opinion.

The request for advisory opinion must be in writing and filed with the city clerk on a form prescribed by the clerk who will present it to the board for consideration. The requesting party may include with the request any documents that may assist the board in responding to the request.

Rule 202. Dismissal.

- a. The city clerk may administratively dismiss a request for an advisory opinion if the request fails to comply with Rule 201 of this Chapter.
- b. The board may administratively dismiss a request for an advisory opinion for either of the following reasons:
 - (i) One or more requests or complaints regarding the same matter are pending.
 - (ii) The board previously addressed the subject matter.

Rule 203. Additional Information.

Upon presentation of a request for an advisory opinion, the board may direct the city clerk to obtain additional information regarding the request.

Rule 204. Summary Decision.

At any time, the board may issue an advisory opinion decision on the request based on any of the following reasons:

- a. The board lacks jurisdiction over the requesting or subject party.
- b. The board lacks jurisdiction over the subject matter.
- c. The requesting party lacks the legal capacity to request an advisory opinion.
- d. The request for an advisory opinion is barred because of release, prior judgment, or other disposition of the matter before the request for an advisory opinion was filed.
- e. The request for advisory opinion on its face fails to demonstrate any violation of the code of ethics.

Rule 205. Summary Opinion.

If no genuine issue as to any material fact exists, the board may issue an advisory opinion without a hearing.

Rule 206. Scheduling.

If the request for an advisory opinion is not resolved under Rule 204 or 205, the board may schedule a meeting or hearing in accordance with the Rules of this Chapter.

Rule 207. Meeting Date.

The clerk will set the matter for meeting on a date certain and place the matter on the board's calendar. The board may hold a hearing to review, or further review, the merits of a request for an advisory opinion.

Rule 208. Notice of Meeting and Requests to Others to Appear.

The clerk will send notice of the meeting to the requesting party and, where applicable, to the subject party in the manner prescribed by the Code of Ethics. The board may request other persons to appear at the meeting by directing the clerk to send notice of the meeting and a request to appear, accompanied by a copy of the request for advisory opinion.

Rule 209. Appearance of Requesting Party, Subject Party, or Representative.

The requesting party and, where applicable, the subject party, or a representative of either, may appear at the meeting, present information to support or oppose the request, and respond orally to questions presented by the board.

Rule 210. Meetings, Generally.

The board will conduct a meeting on the matter set forth in the request for advisory opinion at the scheduled time. Any person requested to appear at the meeting may be accompanied by an attorney.

Rule 211. Presiding Officer.

The Chairperson of the board will act as the presiding officer for the meeting or may assign another member of the board to be the presiding officer. The presiding officer

will officiate over the meeting; moderate the questions and answers between members of the board, the requesting party, the subject party, and any other witness; and rule on questions of procedure and the admissibility of evidence. The presiding officer will consult with other members of the board before making any decision.

Rule 212. Presentation of the Request and the Evidence.

The requesting party will present the request by stating the issue to be resolved and giving any evidence that bears on the matter. The subject party, where applicable, may likewise present any evidence that bears on the matter. The board may request the testimony of other witnesses and the introduction of exhibits or other evidence relevant to the matter. The requesting party, the subject party, and any member of the board may question any witness in the manner directed by the presiding officer. All witnesses will give testimony on sworn oath or affirmation.

Rule 213. Post-Meeting Evidence.

The board may request the requesting party, the subject party where applicable, or any other person to submit post-meeting evidence if warranted.

Rule 214. Closure of the Record.

The record is closed at the conclusion of the meeting or, if the board requests any person to submit post-meeting evidence, at the earlier of the submission of the evidence or the deadline for submitting it. The board may re-open the record and take additional evidence before rendering its decision.

Rule 215. Advisory Opinion.

The board will determine whether the conduct or anticipated conduct of the requesting party or the subject party, as the case may be, conforms to the Code of Ethics. The board will make its decision upon a vote of a majority of the board based upon the evidence in the record and controlling law. The board will issue its decision in the form of a written advisory opinion. The advisory opinion, and any dissenting or concurring opinion, will be stated in writing. Once they are issued, the opinions are final.

Rule 216. Transmittal of the Advisory Opinion or Order.

The board will send its advisory opinion or order to the city clerk, who will publish, distribute and keep it in the manner prescribed in the ordinance and in conformity with applicable law. The clerk will mail the requesting party, the subject party, the affected department, and other persons as the board directs, a copy of the opinion or order.

Chapter 3. Procedure for Resolving Complaints.

The rules in this chapter apply to the situation where any person has a complaint against a city official or employee, as defined in the Code of Ethics, alleging that the conduct of that official or employee is in breach of the code.

Rule 301. Filing of Complaint.

A person with a complaint involving the applicability of any provision of the Code of Ethics with respect to the conduct of a city official or employee may bring the matter before the board by filing with the city clerk a complaint on a form prescribed by the

clerk. The person who files the complaint is called the “complainant.” The person who is alleged to have breached the code is called the “respondent.”

Rule 302. Dismissal.

- a. The city clerk may administratively dismiss a complaint if it fails to comply with Rule 301 of this Chapter.
- b. The board may administratively dismiss a complaint for either of the following reasons:
 - (i) One or more complaints or requests for advisory opinions regarding the same matter are pending.
 - (ii) The board previously addressed the subject matter.

Rule 303. Additional Information.

Upon the filing of a complaint, the board may direct the city clerk to obtain additional information regarding the request.

Rule 304. Summary Decision.

At any time, the board may issue a decision on the complaint based on any of the following reasons:

- a. The board lacks jurisdiction over the respondent.
- b. The board lacks jurisdiction over the subject matter.
- c. The complainant lacks the legal capacity to assert the complaint.
- d. The complaint is barred because of release, prior judgment, or other disposition of the complaint before the complaint was filed.
- e. The complaint on its face fails to demonstrate any violation of the code of ethics.

Rule 305. Summary Opinion.

If no genuine issue as to any material fact exists, the board may issue a decision on the complaint without a hearing.

Rule 306. Scheduling.

If the complaint is not resolved under Rule 205 and 206, the board may schedule a meeting or hearing in accordance with the Rules of this Chapter.

Rule 307. Hearing Date.

Within seven (7) days of the filing of the complaint, the clerk will set the matter for hearing on a date certain and place the matter on the board’s calendar in accordance with the ethics ordinance and these procedural rules.

Rule 308. Service of Complaint on, and Notice to, Respondent.

At least twenty-eight (28) days before the hearing date, the clerk will send notice of the hearing, accompanied by a copy of the complaint to the respondent in the manner prescribed by the code.

Rule 309. Notice of Hearing to Complainant and Requests to Others to Appear.

After setting the matter for hearing, the clerk will notify the complainant of the hearing date in the manner prescribed by the Code of Ethics. The board may request other persons to appear at the hearing by directing the clerk to send notice of the hearing and

a request to appear, accompanied by a copy of the complaint in the manner prescribed by the code.

Rule 310. Answer of Respondent.

Ahead of the hearing date, the respondent may submit a written answer to the complaint by filing that answer with the city clerk. In the answer, the respondent may respond to the allegations set forth in the complaint and may further provide information, including documents, relevant to the matter. In lieu of a written answer, the respondent may appear at the hearing and respond orally to the allegations in the complaint.

Rule 311. Hearings, Generally.

The board will conduct a hearing on the matter alleged in the complaint at the scheduled time. Any person requested to appear at the hearing may be represented by an attorney.

Rule 312. Presiding Officer.

The Chairperson of the board will act as the presiding officer for the hearing or may assign another member of the board to be the presiding officer. The presiding officer will officiate over the hearing and rule on questions of procedure and the admissibility of evidence. The presiding officer will consult with other members of the board before making any decision.

Rule 313. Opening Statements.

The opening statement is the parties' way to introduce the matter to the board, summarize the evidence that will be presented during the hearing, and state the relief requested. The complainant and the respondent may each give an opening statement. Usually, the complainant will give the first opening statement, but the board may vary this procedure.

Rule 314. Conduct of Proceedings

- a. The complainant will present evidence to support the complaint. The respondent may then present evidence to support any defense. Witnesses for each party will also submit to questions from the complainant, the respondent, and the board. The board has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- b. The board, exercising its discretion, will conduct the proceedings with a view to expediting the resolution of the matter and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the matter.
- c. The parties may agree to waive oral hearings in any case.

Rule 315. Evidence

- a. The parties may offer such evidence as is relevant and material to the matter and will produce such evidence as the board may deem necessary to an understanding and determination of the matter. Conformity to legal rules of evidence will not be necessary. All evidence will be taken in the presence of the

- board and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.
- b. The board will determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the board to be cumulative or irrelevant.
 - c. The board will take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

Rule 316. Closing Statements.

When the parties have finished presenting their evidence, each may make a closing statement summarizing the evidence, stating the relief requested, and arguing in favor of that relief. Usually, the respondent will give the first closing statement, to be followed by the complainant, but the board may vary this procedure.

Rule 317. Post-Hearing Briefs.

The board may request the parties to submit post-hearing briefs if warranted.

Rule 318. Closure of the Record.

The record is closed at the conclusion of the hearing or, if the board requests the parties to submit post-hearing briefs, at the earlier of the submission of the briefs or the deadline for submitting them. The board may re-open the record and take additional evidence before rendering its decision.

Rule 319. Decision.

The board will determine whether the respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the Code of Ethics. The board will make its decision upon a vote of a majority of the board based upon the evidence in the record and controlling law. The board will issue its decision in the form of a written opinion. The opinion, and any dissenting or concurring opinion, will be stated in writing. Once they are issued, the decision and opinions are final.

Rule 320. Transmittal of the Decision.

The board will send its decision to the city clerk, who will publish, distribute and keep it in the manner prescribed by the ordinance and in conformity with applicable law. The clerk will mail each party, the affected department, and other persons as the board directs, a copy of the decision.

Chapter 4. Procedure for Deciding Referred Questions of Disqualification Due to Conflict of Interest.

The rules in this chapter apply to the situation where, under Section 2-324 of the Code of Ethics, a city official or employee has a conflict of interest in any matter before the city, as defined in the code, has disclosed that conflict on the appropriate records of the city, but refuses to refrain from discussion, deliberation or voting on that matter. In that instance, the affected city body may request the board to decide the question of whether the official or employee must refrain from discussion, deliberation, action or voting on the matter because of disqualification due to a conflict of interest. The rules in this chapter contemplate that the referred question be decided on an expedited basis.

Rule 401. Referral of Question of Disqualification.

The city, its commission, or any city board or committee, which is called the "referring body," may refer to the board the question of whether an official or employee is disqualified from discussion, deliberation, action or voting on any pending matter due to a conflict of interest. The referring body will refer the question of disqualification to the board by filing the question with the city clerk on a form prescribed by the clerk. The referring body may include with the referred question any information and documents that may assist the board in answering the referred question. The person who is alleged to be disqualified due to conflict of interest is called the "respondent."

Rule 402. Dismissal.

- a. The city clerk may administratively dismiss a referred question of disqualification if the referral fails to comply with Rule 401 of this Chapter.
- b. The board may administratively dismiss a referred question of disqualification for either of the following reasons:
 - (i) One or more questions regarding the same matter are pending.
 - (ii) The board previously addressed the subject matter.

Rule 403. Additional Information.

Upon referral of a question of disqualification, the board may direct the city clerk to obtain additional information regarding the request.

Rule 404. Summary Decision.

At any time, the board may issue a decision on the referred question of disqualification based on any of the following reasons:

- a. The board lacks jurisdiction over the respondent.
- b. The board lacks jurisdiction over the subject matter.
- c. The referring body lacks the legal capacity to refer the question to the board.
- d. Decision on the question is barred because of release, prior judgment, or other disposition of the question before the question was referred.
- e. The question on its face fails to demonstrate any conflict of interest or reason for disqualification.

Rule 405. Summary Opinion.

If no genuine issue as to any material fact exists, the board may issue a decision without a hearing.

Rule 406. Scheduling.

If the referred question of disqualification is not decided under Rule 404 and 405, the board may schedule a meeting or hearing in accordance with the Rules of this Chapter.

Rule 407. Hearing Date.

As soon as practicable after the referred question of disqualification is filed, the clerk will set the matter for hearing on a date certain, which may be that very day, and place the matter on the board's calendar. The board may convene and conduct the hearing immediately upon the clerk's receipt of the referred question, or may set another time for the hearing.

Rule 408 Notice of Hearing and Requests to Others to Appear.

The clerk will notify the referring body and the respondent of the hearing. Notice may be given orally or in any other form reasonably calculated to give the date, time, location and subject matter of the hearing. The board may request other persons to appear at the hearing by directing the clerk to notify those persons of the request and transmitting a copy of the referred question to them.

Rule 409 Hearings, Generally.

The board will conduct a hearing on the referred question at the scheduled time.

Rule 410. Presiding Officer.

The Chairperson of the board will act as the presiding officer for the hearing or may assign another member of the board to be the presiding officer. The presiding officer will officiate over the hearing, and rule on questions of procedure and the admissibility of evidence. The presiding officer will consult with other members of the board before making any decision.

Rule 411. Appearance of Referring Body and Respondent.

The referring body and the respondent may appear at the hearing, present information on the referred question of disqualification and respond orally to questions presented by the board. The referring body will designate one of its members or another person to act as its representative for the hearing.

Rule 412. Opening Statements.

The opening statement is the parties' way to introduce the question to the board, summarize the evidence that will be presented during the hearing, and state the party's position on the question. The referring body and the respondent may each give an opening statement. Usually, the referring body will give the first opening statement, but the board may vary this procedure.

Rule 413. Conduct of Proceedings

- a. The referring body will present evidence on the question of disqualification. The respondent may then present evidence to support his or her position on the question. Witnesses for each party will also submit to questions from the referring body and the respondent. The board has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- b. The board, exercising its discretion, will conduct the proceedings with a view to expediting the resolution of the matter and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the matter.
- c. The parties may agree to waive oral hearings in any matter.

Rule 414. Evidence

- a. The parties may offer such evidence as is relevant and material to the question and will produce such evidence as the board may deem necessary to an understanding and determination of the question. Conformity to legal rules of evidence will not be necessary. All evidence will be taken in the presence of the board and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

- b. The board will determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the board to be cumulative or irrelevant.
- c. The board will take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

Rule 415. Closing Statements.

When the parties have finished presenting their evidence, each may make a closing statement, summarizing the evidence, stating the position it takes on the question, and arguing in favor of that position. Usually, the respondent will give the first closing statement, to be followed by the referring body, but the board may vary this procedure.

Rule 416. Post-Hearing Briefs.

The board may request the parties to submit post-hearing briefs if warranted.

Rule 417. Closure of the Record.

The record is closed at the conclusion of the hearing or, if the board requests the parties to submit post-hearing briefs, at the earlier of the submission of the briefs or the deadline for submitting them. The board may re-open the record and take additional evidence before rendering its decision.

Rule 418. Decision.

The board will decide whether the respondent is disqualified from discussion, deliberation, action or voting on the matter pending before the referring body due to a conflict of interest. The board will make its decision upon a vote of a majority of the board based upon the evidence in the record and controlling law. The board will issue its decision in the form of a written opinion. The opinion, and any dissenting or concurring opinion, will be stated in writing. Once they are issued, the decision and opinions are final.

Rule 419. Transmittal of the Decision.

The board will send its decision to the city clerk, who will publish, distribute and keep it in the manner prescribed in the ordinance and in conformity with applicable law. The clerk will provide the referring body, the affected department, and the respondent with a copy of the decision.

Revised 10/03
Revised 05/04
Revised 10/06
Revised 12/06
Revised 1/08
Revised 9/11



MEMORANDUM

City Clerk's Office

DATE: June 6, 2019
TO: Board of Ethics
FROM: J. Cherilynn Mynsberge, City Clerk
SUBJECT: Advisory Opinion 2018-02

Ms. Fierro-Share has submitted a separate opinion regarding Advisory Opinion 2018-02, adopted by the Board on October 2, 2018, and requested that her written statement be put on record.

In addition, Ms. Fierro-Share would like to take action on ideas raised at the January 23, 2019 Board meeting:

- 1) A simple, easy information sheet on issues related to recusal.
- 2) Organizing the process of having City boards and committees address specific concerns around the ethics ordinance.

Attachments:

Separate Opinion on Advisory Opinion 2018-02, submitted by Ms. Fierro-Share
Advisory Opinion 2018-02 as adopted by the Board of Ethics on October 2, 2018

City of Birmingham
Board of Ethics
Advisory Opinion 2018-2

Separate Opinion

Although I approved Advisory Opinion 2018-2 last June, on reflection I am concerned about 4 particular aspects of that Opinion. All concern how to handle citizen advisory board members' possible conflicts of interest. I write to correct and clarify my views on these issues.

The Advisory Opinion considers the intersection of the Ethics Ordinance's general intent, definition and disclosure provisions. As the Opinion notes, the Ethics Ordinance intends to avoid the appearance of a City Official obtaining something not available to the public generally or losing independence of action. 2-323 (2) and (3). It also seeks to sustain public confidence. 2-323(5). Yet it specifically allows citizen board members to participate in decisions that may directly or indirectly affect their financial or personal interests if they meet 3 requirements: that the citizen board member act in the public good; that s/he complies with the board's duties; and that s/he not use the matter to secure something not available to every other citizen. 2-324(a)(9).

The testimony at the hearing was that Mr. Kalczynski considered the relevant aspects of the Ethics Ordinance and decided that he met them in a manner which allowed him to participate. The Chair of the Parking Advisory Committee agreed. Some Ethics Board members expressed concern that Mr. Kalczynski's employment by a competitor of the applicant created the appearance of impropriety, because of the possibility that he might get a bonus or an increased bonus if the competitor's request was denied, although there was no indication he expected such a bonus.

To the extent the Advisory Opinion questioned Mr. Kalczynski's determination, I am troubled. Many Birmingham residents freely give of their time to benefit the City and its residents. The Parking Advisory Committee members are in a much better position than the Ethics Board to judge whether Mr. Kalczynski's participation in the matter was in the public interest. They have

served with him for several years and know the nature of his contribution. We should not lightly set either his or the Advisory Board's determination aside because of speculation.

To the extent the Opinion accepts Mr. Kalczynski's good faith but elevates the intent expressed in Section 2-323 above the specific permission of Section 2-324(a)(9), I likewise have a concern. The Ordinance clearly sets out how to balance the tension between the general desire to avoid the appearance of impropriety and the desire to have the benefit of specialized expertise that citizen board members bring to the City. Compliance with the specific requirement of 2-324(a)(9) necessarily fulfills the intention of the Ethics Ordinance. My view is only as to the decision a board member makes under specific facts of this case; a possible indirect benefit affecting a citizen member of a City board.

Section 2-324(b) requires disclosure of a board of a member's conflict of interest. The Advisory Opinion requires that a citizen board member must review all meeting agendas in advance to determine if there are any items that implicate the Ethics Ordinance; if there is a current, actual or apparent conflict s/he must recuse him or herself; if there is a prior relationship s/he must decide if s/he can be impartial; if the board member determines s/he can be impartial, that decision must be disclosed to the applicable board; the board can determine by vote if recusal is required; and if the vote is not unanimous, the matter must be sent to the Ethics Board for determination before the matter can proceed. There are two aspects of this proposal that I think are neither mandated by the Ethics Ordinance nor good public policy.

Section 2-324(b)(2)(b) says that if a City Official has a conflict of interest and persists in participating in the matter, the issue shall immediately be referred to the Ethics Board for a final determination. It applies when there is a conflict of interest. It does not require immediate reference to the Ethics Board if there is a claim of conflict of interest. When the facts satisfy the 3 tests of 2-324(a)(9), by definition there is no a conflict of interest. Citizen board members need not recuse themselves when there is an apparent conflict of interest and they pass the 3 tests in Section 2-324(a)(9).

I agree that the advisory boards should be the first place to determine whether a disqualifying conflict exists. I disagree that a vote that is not unanimous requires referral to the Ethics Board. I do not see any language in the Ethics

Ordinance that makes the percentage of the vote significant. Without some higher standard required by ordinance or a particular board's rules of procedure, I believe that the advisory boards may determine if a disqualifying conflict of interest exists by majority vote. If the advisory board votes that there is no conflict, the member may participate and the matter may immediately go forward. If the advisory board votes there is a disqualifying conflict and the member recuses, the matter may immediately go forward. Only when the advisory board votes that there is disqualifying conflict and the member insists on participating is immediate referral to the Ethics Board required. 2-324(b)(2)(b). This process will allow for City business to proceed at a reasonable pace while allowing for Ethics Board review. Public confidence is also affected by adherence to ordinances and avoidance of unnecessary delays in carrying out City business. If a member of the public or an advisory board member believe participation violated the Ethics Ordinance, they can file a Complaint or request for an Advisory Opinion and the Ethics Board will address the matter.

In summary:

- 1) If the advisory board or an individual member has made a determination as to the propriety of a citizen board member meeting the standards of 2-324(a)(9), the Ethics Board should respect that decision unless there is convincing evidence that it is mistaken;
- 2) In evaluating whether a citizen board member has an indirect financial or personal interest, the Ethics Board should avoid speculation;
- 3) a citizen board member need only be recused from participating in a matter if s/he or the board in question has concluded by majority vote that a conflict of interest exists; and
- 4) Referral to the Ethics Board for immediate determination of a conflict of interest should occur when the advisory board has determined there is a disqualifying conflict of interest and the member still objects to recusal.

Sophie J. Fierro-Share
January __, 2019

CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2018-02

QUESTIONS PRESENTED

1. Does a conflict of interest exist under the City of Birmingham's Ethics Ordinance if a City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as an employee in any business that would 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 the official's governmental duties?
2. Is it a violation of the Ethics Ordinance for a City Official to participate in a decision that may directly or indirectly affect his or her financial or personal interests provided that they act, in furtherance of the public good, in compliance with the duties of his or her respective board, and in a manner consistent with no use or attempted use of official position to obtain or provide special consideration or advantage?
3. Should a City Official participate, as a representative of the City, in any discussion or vote and/or other action upon any matter in which he or she has directly or indirectly a financial or personal interest?

SUMMARY OF ANSWERS

1. Affirmative.
2. Negative.
3. It depends upon the circumstances.

PROCEDURAL HISTORY

The City of Birmingham (the "City") has declared that public office is a public trust. For a government to operate properly, each City Official must honor and earn the public trust by conduct and integrity. All City Officials must avoid conflicts between private interest and public interest and must not use public office for personal gain. Through the Ethics Ordinance, the City has established minimum rules or standards of ethical conduct for City Officials and has designed a process for determining whether their conduct conforms to or violates the ordinance. That process contemplates the involvement of all citizens in monitoring the integrity of City government. When there is a question or a complaint as to the applicability of any provision of the Ethics Ordinance to a particular situation, the City directs that question or complaint to the Board of Ethics. The Board of Ethics may conduct hearings and issue advisory opinions as applicable under the ordinance.

On May 11, 2018 the City of Birmingham City Clerk's office received an Ethics Incident/Complaint from David Hohendorf, publisher of Downtown Publications, in relation to Steven Kalczynski, a member of the City's Advisory Parking Committee and also an employee of the Townsend Hotel. On May 31, 2018, Mr. Kalczynski filed with the City Clerk's office a response thereto.

On Tuesday, June 19, 2018, the City's Board of Ethics convened to conduct a public hearing in relation to the subject Complaint. During the course of the hearing, Mr. Hohendorf expressed that he was not looking for the imposition of any sanction upon Mr. Kalczynski for a possible past violation of the Code of Ethics (the "Code" or "Ethics Ordinance"). As expressed in his Complaint, Mr. Hohendorf was concerned about Mr. Kalczynski's future participation before the Advisory Parking Committee under certain circumstances. After further discussion, Mr. Hohendorf elected to dismiss his Ethics Complaint, along with the request of Mr. Kalczynski to the Board of Ethics for an "advisory opinion" in association with the incident and situation at hand. See Section 2-325(b)¹ and Chapter 2 of the Board of Ethics Procedural Rules. The Board granted the dismissal of the Complaint, and accepted a modification of the matter to one of a request for an advisory opinion. Pursuant to Section 2-325(a)(3)(c) this Board may establish such procedures it deems necessary or appropriate to perform its functions as set forth in the Code.

STATEMENT OF FACTS

Steven Kalczynski is a resident of the City of Birmingham, and at all times pertinent hereto was employed as the Managing Director of the Townsend Hotel (the "Townsend") in Birmingham, Michigan. Mr. Kalczynski does not have an ownership interest in the Townsend.

Mr. Kalczynski serves on the City's Advisory Parking Committee ("APC"), and his term expires on September 4, 2020. He is the designated representative of large retailers in downtown Birmingham, as each of the members of the APC bear a specific designation.

The subject matter was before the APC in association with the Daxton Hotel's request for a permit to construct a 5-story hotel with two underground levels of private parking. The plans previously received Community Impact Study and Preliminary Site Plan approval from the City's Planning Board. As a condition of such approval, the Planning Board requested the applicant to appear before the APC to receive a recommendation relative to the removal of on-street parking, as proposed in their plan.

On or about August 2, 2017, the APC conducted a meeting to consider whether to recommend for approval the removal of eight on-street parking spaces at 298 S. Old Woodward for operation of a valet service, as requested by the owners of the new proposed Daxton Hotel. During the meeting, an attorney for the Daxton Hotel "wanted to ensure there is no conflict of interest with respect to Mr. Kalczynski being the manager of the Townsend Hotel." Mr. Kalczynski did not believe there was a conflict of interest regarding a vote as to whether changes should be made to the parking space arrangements near the Daxton Hotel. The APC Chairman

¹ All references to "Section" relate to the City's Ethics Ordinance.

responded to counsel indicating the nature of the APC is that it is comprised of stakeholders, and that Mr. Kalczynski provides insight into situations that the committee would not have otherwise. No member of the APC raised the issue of a potential conflict, and no vote was taken as to recusal and/or disqualification.

Mr. Kalczynski responded that "he does not have a conflict of interest, that his role in the APC is only to approve or disapprove recommendations for parking, and that he will not recuse himself from the consideration of this matter." Mr. Kalczynski maintains he did not have a conflict of interest because he did not have a financial interest or personal interest in removal of parking spaces. He further maintains that he has no conflict because he holds no ownership interest in the Townsend Hotel, but is merely an employee. He also asserts that even if he had a personal or financial interest he did not have a conflict of interest under the Code because he acted within the public interest. He stated that he believed that removing additional street level parking spaces is not in the public's best interest because street parking in that particular area is extremely limited. He stated that he was acting within the scope of his duties and did not attempt to use his position to secure or grant himself any benefits as a result of his vote.

The applicant was requesting removal of existing parking spaces to create a permanent valet service at the front door of the new building on S. Old Woodward Avenue. It was noted that there is precedent in the city for removing parking spaces for valet. The Townsend itself pays a fee for the former meters and uses 7 parking spaces along Merrill Street. The APC was being asked to similarly remove 8 spaces. Mr. Kalczynski expressed concern relative to delivery trucks seeking to unload on Brown Street and in light of there only being one traffic lane, and considering traffic flow and parking intertwined. Nevertheless, the Traffic Management Plan was reviewed by the City's Traffic Engineer and he signed off, as did the Planning Board. The Plan provides for valet at the front door. As for the loading situation on Brown Street, trucks will back up into a driveway and be off the road and be able to use that area for loading and unloading.

At the APC meeting, committee member Ms. Champagne moved the recommendation for approval of removal of the eight on-street parking spaces to allow for the operation of a valet service by the property owner, in exchange for an annual payment of \$24,000.00 (@ \$3,000.00 per meter) to be charged annually once the Daxton Hotel is open for business. She noted that one of the things that makes the Townsend special in the city is the valet in front. The motion carried 5 -1, with the only "nay," being that of Mr. Kalczynski.

Mr. Hohendorf maintained in his Complaint that the City's approval of the Daxton Hotel had a direct impact on the Townsend, and that Mr. Kalczynski should have recused himself from participation in any deliberations and subsequent voting on issues relating to the Daxton Hotel. Mr. Kalczynski responded that his aforesaid vote was made with the public's interest at heart, that the limited parking is of grave concern for the citizens, and that there is a substantial waiting list for monthly parking permits in the City's parking structures and lots. He reported that even after the APC vote to recommend to approve the plan, the City Commissioners agreed with his position and voted to send the issue back to the Planning Board for further study. Mr. Hohendorf is concerned that the issue of parking at the Daxton Hotel could in the future result in further considerations, deliberations and/or voting before the APC, and he maintains that in such an

instance that Mr. Kalczynski must recuse himself as he has a conflict of interest. Both gentlemen cite and rely upon Section 2-324 of the Code. This Board is aware of a perception by some of a hotel battle brewing between the Townsend and the Daxton.

JURISDICTION

In light of the aforesaid procedural history, this Board will consider this matter as a request for an advisory opinion by Mr. Kalczynski pertaining to his conduct or anticipated conduct, and its conformance to the Code.

Unquestionably, Mr. Kalczynski is a "City Official," pursuant to Section 2-322 of the Code, in that he is a person who has been appointed and serving in a capacity with the City in a position established by City Charter or by City Ordinance which involves the exercise of a public power, trust or duty. He serves on an advisory board, the APC.

Accordingly, pursuant to Section 2-325(b), this Board has the authority to issue the requested advisory opinion.

APPLICATION OF THE CODE OF ETHICS

Both Messrs. Hohendorf and Kalczynski cite and rely upon Section 2-324 of the Code, for their respective positions stated herein. Section 2-323 sets forth the intention of the Code, specifically Section 2-324 which pertains to conflict of interest. Section 2-323 provides in pertinent part that a City Official should avoid any action, whether or not specifically prohibited by Section 2-324, which might result in, or create the appearance of using public office for private gain, giving or accepting preferential treatment, using impartiality of action, or affecting adversely the confidence of the public or the integrity of the city government.

Pursuant to Section 2-324(a)(6), it is noted that an appointed City Official is not prohibited from engaging in private employment or business on his or her own time as a private citizen and/or where city business is not involved, subject to his or her disclosing such private employment or business on the public record before any matter on which he or she may be called upon to act in his or her official capacity. However, it further provides that he or she shall refrain from voting upon or otherwise participating in debate on any such matter in which he or she has directly or indirectly a financial or personal interest. "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. Section 2-322.

Section 2-324(a)(8) applies as it provides in part that no official of the City shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration or advantage beyond that which is available to every other citizen.

Mr. Kalczynski in his response, cites and principally relies in support of his position on Section 2-324(a)(9), which provides as follows: "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."

Section 2-324(a)(10) pertains to the determination of conflict of interest, and states in pertinent part in subsection a. thereof that a conflict of interest exists if the City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as employee, etc., 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 governmental duties. "Financial interest" means any interest in money, property or thing of value or benefit. Section 2-322. "Personal interest" means, in part, any interest arising from any business association. Section 2-322.

Both Messrs. Hohendorf and Kalczynski cite and rely upon subsection (b) of Section 2.324, pertaining to full disclosure. Section 2-324(b)(1) pertains to the responsibility to disclose, as follows: "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."

Section 2-324(b)(2) pertains to the disclosure of conflict of interest and disqualification, as it provides in pertinent part in subsection (a) 2.: "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: 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."

Subsection b. of Section 2-324(b)(2) is also informative herein, and it provides that: "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 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 should refrain from discussion, deliberation, action or voting thereon."

Individuals have multiple roles in their daily lives, and because of same they inherently possess many different interests and loyalties. These interests may compete at any given time. Such conflicts are unavoidable as they are a part of life. As stewards of the public trust, City Officials are required to put the public's interest before their own. Impropriety occurs when the City Official who is faced with conflicting interests puts his or her personal or financial interest in priority to the public interest.

As City Officials have lives outside work, and thus conflicts of interest are likely to exist, if they cannot be avoided they must be disclosed and managed in a planned way. It is important to understand that:

- a. The appearance and perception of a conflict of interest is as important to manage as an actual conflict;
- b. Conflicts of interest are usually personal, and therefore must be managed by the individual involved, however the City has the responsibility for implementing policies, processes and/or systems to assist City Officials to recognize conflicts of interest and deal with them.
- c. City Officials should know the City's conflict of interest ordinance and the Ethics Board procedures, and actively facilitate discussion about how to manage conflicts of interest before they happen and assisting others to manage these as they arise; and
- d. City Officials should feel confident that they can discuss issues of conflict with their colleagues, and that the climate of discussion will be one of assistance and support.

One of the aims of the Ethics Ordinance is to regulate conflict of interest in City government. City Officials are expected to put service to the public ahead of personal interests. The ordinance is intended to prevent officials from making decisions in circumstances that could reasonably be perceived as violating this duty of office. Identifying and resolving conflict of interest situations is crucial to good governance and maintaining trust in City government. Citizens have increasing expectations that government should deliver higher standards of integrity. Conflict of interest should become a significant consideration of those who occupy any position of trust. If conflicts of interest are not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, and government.

Conflicts between private interests and public duties of City Officials must be correctly identified, appropriately managed, and effectively resolved. Left unresolved, conflict of interest can result in corrupt conduct, abuse of public office, misconduct, breach of trust, or unlawful action. Also, public confidence in the integrity of City government can also be seriously damaged. Maintaining trust is a central integrity issue for government and individual officials. Trust can be protected and improved, by making sure that there is no improper connection

between City Officials' functions and their private interests, including the interests of related persons or organizations.

Conflicts of interest interfere with the basic ethical principle of fairness, which is treating everyone the same. A City Official should not take unfair advantage of his or her position by voting on a matter that could benefit him or her at the expense of others. A City Official may honestly believe he or she is not being duly influenced by their personal stake in an issue. To the contrary, he or she may feel that his or her interest in the matter gives him or her a special insight into the subject. He or she may argue that he or she understands the problems of a downtown business because he or she owns or manages one. Nevertheless, it is very difficult for individuals to determine whether they are being fair when their self-interest is involved. Therefore, the Ethics Ordinance prohibits such partiality. The ordinance is aimed at the perception, as well as the reality, that a City Official's personal interests may influence a decision. Even the appearance of impropriety undermines the public's trust that the process is fair. See Sections 2-321 and 2-323.

A City Official is not absolved of his or her responsibility merely by being transparent about his or her stake in the issue. It is insufficient for City Officials to make conflicts public. They must remove themselves from the decision-making process altogether. This includes discussion as well as voting. Abstention is only half of the requirement. For further guidance relative to disclosure and/or recusal, see this Board's Advisory Opinions 2003-03 and 2015-06.

An interest may be personal as well as financial. A personal interest, would especially exist if it improves one's standing in the organization. A personal interest which could constitute a potential conflict of interest situation may include a position held in a business, community or organization. Public office should not be used to punish one's personal and/or political enemies. Rather, City Officials are expected to understand the meaning of the Ethics Ordinance, and comply with same. Every City Official but must be alert to, and responsive to, actual and perceived conflicts of interest. They can avoid or preempt conflicts of interest by understanding and exhibiting the behaviors required of a City Official. City Officials must take personal responsibility for identifying and resolving problem situations. A beneficial discussion and analysis of this topic is set forth in this Board's Advisory Opinion 2012-01.

The presence of a conflict of interest is independent of the occurrence of impropriety. A conflict of interest exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that a decision may be unduly influenced by a secondary interest, and not on whether a particular individual is actually influenced by a secondary interest. "Secondary interest" includes personal benefit and is not limited to only financial gain but also such motives as the desire for professional advancement, or the wish to do favors for others from "an interest arising from blood or marriage relationships or any business association." Section 2-322.

An apparent conflict of interest situation can be as seriously damaging to the public's confidence in a City Official, or the City, as an actual conflict. An apparent conflict of interest should therefore be treated as though it were an actual conflict, until such time as the doubt is removed and the matter is determined, after investigation of all the relevant facts.

City Officials are expected to maintain and strengthen the public's trust and confidence in the City, by demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the U.S. and State of Michigan Constitutions and laws, and seeking to advance the public good at all times. City Officials are expected to make decisions and act without consideration of their private interests. Public service being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of professional integrity.

The proper objective of the effective conflict of interest policy is not the simple prohibition of all private interests on the part of City Officials, even if such an approach were conceivable. The objective should be to maintain the integrity of official policy and administrative decisions and of City management generally, recognizing that an unresolved conflict of interest may result in abuse of public office.

A too-strict approach to controlling the exercise of private interests may conflict with other rights, or be unworkable or counterproductive in practice, or may deter some people from seeking public office altogether. Therefore, the City's Ethics Ordinance seeks to strike a balance, by identifying risks to the integrity of the City Officials, prohibiting unacceptable forms of conflict, managing conflict situations appropriately, making the City and individual officials aware of the incidence of such conflicts, and insuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations.

An "apparent" conflict of interest exists where it "appears" that a City Official's private interests could improperly influence the performance of his or her duties but this is not in fact the case. A "potential" conflict arises where a City Official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

A City Official should dispose of, or restrict the operation of, personal interests or private gain that could compromise official decisions in which they participate. Where this is not feasible, a City Official should abstain from involvement in official decisions which could be compromised by their personal interests and affiliations, and private gain.

In summary, City Officials are expected to:

- a. Act in a manner that will bear the closest public scrutiny. This obligation is not fully discharged simply by acting within the letter of the law; it also entails respecting broader public service values such as disinterestedness, impartiality and integrity;
- b. Act at all times so that their integrity serves as an example to other City Officials and the public;

- c. Accept responsibility for identifying and resolving conflicts in favor of the public interest when a conflict does arise; and
- d. Demonstrate their commitment to integrity and professionalism through their application of effective conflict of interest policy and practice.

The hearing in the instant case brought to light that there is a need for City Officials and boards to further acquaint themselves with the City's Ethics Ordinance and this Board's Rules of Procedure. So as to further engender an organizational culture which is intolerant of conflicts of interest:

- a. The City should continue to encourage the effective control and management of conflict of interest situations;
- b. The City should continue to encourage City Officials to disclose and discuss conflict of interest matters;
- c. The City should continue to create and sustain a culture of open communication and dialogue concerning integrity and its promotion; and
- d. The City should continue to provide guidance and training to promote understanding of the Ethics Ordinance.

The City has to date worked to ensure understanding of the Ethics Ordinance, including without limitation:

- a. Publicized the Ethics Ordinance, Rules of Procedure, and Opinions;
- b. Ensured that the rules and procedures are available;
- c. Provided guidance with information, advice, and training seminars;
- d. Provided assistance to City Officials who are in doubt about the application of the Ethics Ordinance, and widely publicize how to obtain such advice; and
- e. Identified preventative measures that deal with conflict situations, including recusal.

CONCLUSION

It does not appear that Mr. Kalczynski had or has an "actual" conflict of interest herein. Yet, as evidenced by the filing of the Complaint herein there may have been an "apparent" conflict. Mr. Kalczynski may continue to participate on the APC in discussions and voting in association with the Daxton Hotel project provided that he act in furtherance of the public good, in compliance with his duties to the APC, and consistent with the requirements of the Ethics


Ordinance. He must be impartial. He must also be cognizant of the appearance of a conflict of interest, as well as the public's perception, whether or not specifically prohibited by Section 2-324. The ordinance "is intended to be preventative."

As the ordinance requires voluntary disclosure to assist in identifying the difference between relationships that require recusal and those which do not, he should going forward (a) review the APC agenda and decide whether there is an Ethics Ordinance issue as to any item, (b) if there is a current relationship that involves a personal or financial interest which would constitute an apparent conflict of interest or more, he must recuse himself from participation, (c) if there is a prior relationship, he must decide if he can be impartial, (d) if he cannot be impartial, he must recuse himself, and (e) if he believes he can be impartial, he must disclose the relationship to the APC at the public meeting before participating and explain why recusal is unnecessary. The APC, as a board, can then determine by vote whether his recusal is required. If the vote is not unanimous, the ordinance issue should first be sent to the Board of Ethics for determination.

Approved:



John J. Schrot, Jr.
Acting Chairperson



James D. Robb
Member



Sophie Fierro-Share
Member



MEMORANDUM

City Clerk's Office

DATE: June 6, 2019
TO: Board of Ethics
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To the extent the Advisory Opinion questioned Mr. Kalczynski's determination, I am troubled. Many Birmingham residents freely give of their time to benefit the City and its residents. The Parking Advisory Committee members are in a much better position than the Ethics Board to judge whether Mr. Kalczynski's participation in the matter was in the public interest. They have

served with him for several years and know the nature of his contribution. We should not lightly set either his or the Advisory Board's determination aside because of speculation.

To the extent the Opinion accepts Mr. Kalczynski's good faith but elevates the intent expressed in Section 2-323 above the specific permission of Section 2-324(a)(9), I likewise have a concern. The Ordinance clearly sets out how to balance the tension between the general desire to avoid the appearance of impropriety and the desire to have the benefit of specialized expertise that citizen board members bring to the City. Compliance with the specific requirement of 2-324(a)(9) necessarily fulfills the intention of the Ethics Ordinance. My view is only as to the decision a board member makes under specific facts of this case; a possible indirect benefit affecting a citizen member of a City board.

Section 2-324(b) requires disclosure of a board of a member's conflict of interest. The Advisory Opinion requires that a citizen board member must review all meeting agendas in advance to determine if there are any items that implicate the Ethics Ordinance; if there is a current, actual or apparent conflict s/he must recuse him or herself; if there is a prior relationship s/he must decide if s/he can be impartial; if the board member determines s/he can be impartial, that decision must be disclosed to the applicable board; the board can determine by vote if recusal is required; and if the vote is not unanimous, the matter must be sent to the Ethics Board for determination before the matter can proceed. There are two aspects of this proposal that I think are neither mandated by the Ethics Ordinance nor good public policy.

Section 2-324(b)(2)(b) says that if a City Official has a conflict of interest and persists in participating in the matter, the issue shall immediately be referred to the Ethics Board for a final determination. It applies when there is a conflict of interest. It does not require immediate reference to the Ethics Board if there is a claim of conflict of interest. When the facts satisfy the 3 tests of 2-324(a)(9), by definition there is no a conflict of interest. Citizen board members need not recuse themselves when there is an apparent conflict of interest and they pass the 3 tests in Section 2-324(a)(9).

I agree that the advisory boards should be the first place to determine whether a disqualifying conflict exists. I disagree that a vote that is not unanimous requires referral to the Ethics Board. I do not see any language in the Ethics

Ordinance that makes the percentage of the vote significant. Without some higher standard required by ordinance or a particular board's rules of procedure, I believe that the advisory boards may determine if a disqualifying conflict of interest exists by majority vote. If the advisory board votes that there is no conflict, the member may participate and the matter may immediately go forward. If the advisory board votes there is a disqualifying conflict and the member recuses, the matter may immediately go forward. Only when the advisory board votes that there is disqualifying conflict and the member insists on participating is immediate referral to the Ethics Board required. 2-324(b)(2)(b). This process will allow for City business to proceed at a reasonable pace while allowing for Ethics Board review. Public confidence is also affected by adherence to ordinances and avoidance of unnecessary delays in carrying out City business. If a member of the public or an advisory board member believe participation violated the Ethics Ordinance, they can file a Complaint or request for an Advisory Opinion and the Ethics Board will address the matter.

In summary:

- 1) If the advisory board or an individual member has made a determination as to the propriety of a citizen board member meeting the standards of 2-324(a)(9), the Ethics Board should respect that decision unless there is convincing evidence that it is mistaken;
- 2) In evaluating whether a citizen board member has an indirect financial or personal interest, the Ethics Board should avoid speculation;
- 3) a citizen board member need only be recused from participating in a matter if s/he or the board in question has concluded by majority vote that a conflict of interest exists; and
- 4) Referral to the Ethics Board for immediate determination of a conflict of interest should occur when the advisory board has determined there is a disqualifying conflict of interest and the member still objects to recusal.

Sophie J. Fierro-Share
January __, 2019

CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2018-02

QUESTIONS PRESENTED

1. Does a conflict of interest exist under the City of Birmingham's Ethics Ordinance if a City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as an employee in any business that would 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 the official's governmental duties?
2. Is it a violation of the Ethics Ordinance for a City Official to participate in a decision that may directly or indirectly affect his or her financial or personal interests provided that they act, in furtherance of the public good, in compliance with the duties of his or her respective board, and in a manner consistent with no use or attempted use of official position to obtain or provide special consideration or advantage?
3. Should a City Official participate, as a representative of the City, in any discussion or vote and/or other action upon any matter in which he or she has directly or indirectly a financial or personal interest?

SUMMARY OF ANSWERS

1. Affirmative.
2. Negative.
3. It depends upon the circumstances.

PROCEDURAL HISTORY

The City of Birmingham (the "City") has declared that public office is a public trust. For a government to operate properly, each City Official must honor and earn the public trust by conduct and integrity. All City Officials must avoid conflicts between private interest and public interest and must not use public office for personal gain. Through the Ethics Ordinance, the City has established minimum rules or standards of ethical conduct for City Officials and has designed a process for determining whether their conduct conforms to or violates the ordinance. That process contemplates the involvement of all citizens in monitoring the integrity of City government. When there is a question or a complaint as to the applicability of any provision of the Ethics Ordinance to a particular situation, the City directs that question or complaint to the Board of Ethics. The Board of Ethics may conduct hearings and issue advisory opinions as applicable under the ordinance.

On May 11, 2018 the City of Birmingham City Clerk's office received an Ethics Incident/Complaint from David Hohendorf, publisher of Downtown Publications, in relation to Steven Kalczynski, a member of the City's Advisory Parking Committee and also an employee of the Townsend Hotel. On May 31, 2018, Mr. Kalczynski filed with the City Clerk's office a response thereto.

On Tuesday, June 19, 2018, the City's Board of Ethics convened to conduct a public hearing in relation to the subject Complaint. During the course of the hearing, Mr. Hohendorf expressed that he was not looking for the imposition of any sanction upon Mr. Kalczynski for a possible past violation of the Code of Ethics (the "Code" or "Ethics Ordinance"). As expressed in his Complaint, Mr. Hohendorf was concerned about Mr. Kalczynski's future participation before the Advisory Parking Committee under certain circumstances. After further discussion, Mr. Hohendorf elected to dismiss his Ethics Complaint, along with the request of Mr. Kalczynski to the Board of Ethics for an "advisory opinion" in association with the incident and situation at hand. See Section 2-325(b)¹ and Chapter 2 of the Board of Ethics Procedural Rules. The Board granted the dismissal of the Complaint, and accepted a modification of the matter to one of a request for an advisory opinion. Pursuant to Section 2-325(a)(3)(c) this Board may establish such procedures it deems necessary or appropriate to perform its functions as set forth in the Code.

STATEMENT OF FACTS

Steven Kalczynski is a resident of the City of Birmingham, and at all times pertinent hereto was employed as the Managing Director of the Townsend Hotel (the "Townsend") in Birmingham, Michigan. Mr. Kalczynski does not have an ownership interest in the Townsend.

Mr. Kalczynski serves on the City's Advisory Parking Committee ("APC"), and his term expires on September 4, 2020. He is the designated representative of large retailers in downtown Birmingham, as each of the members of the APC bear a specific designation.

The subject matter was before the APC in association with the Daxton Hotel's request for a permit to construct a 5-story hotel with two underground levels of private parking. The plans previously received Community Impact Study and Preliminary Site Plan approval from the City's Planning Board. As a condition of such approval, the Planning Board requested the applicant to appear before the APC to receive a recommendation relative to the removal of on-street parking, as proposed in their plan.

On or about August 2, 2017, the APC conducted a meeting to consider whether to recommend for approval the removal of eight on-street parking spaces at 298 S. Old Woodward for operation of a valet service, as requested by the owners of the new proposed Daxton Hotel. During the meeting, an attorney for the Daxton Hotel "wanted to ensure there is no conflict of interest with respect to Mr. Kalczynski being the manager of the Townsend Hotel." Mr. Kalczynski did not believe there was a conflict of interest regarding a vote as to whether changes should be made to the parking space arrangements near the Daxton Hotel. The APC Chairman

¹ All references to "Section" relate to the City's Ethics Ordinance.

responded to counsel indicating the nature of the APC is that it is comprised of stakeholders, and that Mr. Kalczynski provides insight into situations that the committee would not have otherwise. No member of the APC raised the issue of a potential conflict, and no vote was taken as to recusal and/or disqualification.

Mr. Kalczynski responded that "he does not have a conflict of interest, that his role in the APC is only to approve or disapprove recommendations for parking, and that he will not recuse himself from the consideration of this matter." Mr. Kalczynski maintains he did not have a conflict of interest because he did not have a financial interest or personal interest in removal of parking spaces. He further maintains that he has no conflict because he holds no ownership interest in the Townsend Hotel, but is merely an employee. He also asserts that even if he had a personal or financial interest he did not have a conflict of interest under the Code because he acted within the public interest. He stated that he believed that removing additional street level parking spaces is not in the public's best interest because street parking in that particular area is extremely limited. He stated that he was acting within the scope of his duties and did not attempt to use his position to secure or grant himself any benefits as a result of his vote.

The applicant was requesting removal of existing parking spaces to create a permanent valet service at the front door of the new building on S. Old Woodward Avenue. It was noted that there is precedent in the city for removing parking spaces for valet. The Townsend itself pays a fee for the former meters and uses 7 parking spaces along Merrill Street. The APC was being asked to similarly remove 8 spaces. Mr. Kalczynski expressed concern relative to delivery trucks seeking to unload on Brown Street and in light of there only being one traffic lane, and considering traffic flow and parking intertwined. Nevertheless, the Traffic Management Plan was reviewed by the City's Traffic Engineer and he signed off, as did the Planning Board. The Plan provides for valet at the front door. As for the loading situation on Brown Street, trucks will back up into a driveway and be off the road and be able to use that area for loading and unloading.

At the APC meeting, committee member Ms. Champagne moved the recommendation for approval of removal of the eight on-street parking spaces to allow for the operation of a valet service by the property owner, in exchange for an annual payment of \$24,000.00 (@ \$3,000.00 per meter) to be charged annually once the Daxton Hotel is open for business. She noted that one of the things that makes the Townsend special in the city is the valet in front. The motion carried 5 -1, with the only "nay," being that of Mr. Kalczynski.

Mr. Hohendorf maintained in his Complaint that the City's approval of the Daxton Hotel had a direct impact on the Townsend, and that Mr. Kalczynski should have recused himself from participation in any deliberations and subsequent voting on issues relating to the Daxton Hotel. Mr. Kalczynski responded that his aforesaid vote was made with the public's interest at heart, that the limited parking is of grave concern for the citizens, and that there is a substantial waiting list for monthly parking permits in the City's parking structures and lots. He reported that even after the APC vote to recommend to approve the plan, the City Commissioners agreed with his position and voted to send the issue back to the Planning Board for further study. Mr. Hohendorf is concerned that the issue of parking at the Daxton Hotel could in the future result in further considerations, deliberations and/or voting before the APC, and he maintains that in such an

instance that Mr. Kalczynski must recuse himself as he has a conflict of interest. Both gentlemen cite and rely upon Section 2-324 of the Code. This Board is aware of a perception by some of a hotel battle brewing between the Townsend and the Daxton.

JURISDICTION

In light of the aforesaid procedural history, this Board will consider this matter as a request for an advisory opinion by Mr. Kalczynski pertaining to his conduct or anticipated conduct, and its conformance to the Code.

Unquestionably, Mr. Kalczynski is a "City Official," pursuant to Section 2-322 of the Code, in that he is a person who has been appointed and serving in a capacity with the City in a position established by City Charter or by City Ordinance which involves the exercise of a public power, trust or duty. He serves on an advisory board, the APC.

Accordingly, pursuant to Section 2-325(b), this Board has the authority to issue the requested advisory opinion.

APPLICATION OF THE CODE OF ETHICS

Both Messrs. Hohendorf and Kalczynski cite and rely upon Section 2-324 of the Code, for their respective positions stated herein. Section 2-323 sets forth the intention of the Code, specifically Section 2-324 which pertains to conflict of interest. Section 2-323 provides in pertinent part that a City Official should avoid any action, whether or not specifically prohibited by Section 2-324, which might result in, or create the appearance of using public office for private gain, giving or accepting preferential treatment, using impartiality of action, or affecting adversely the confidence of the public or the integrity of the city government.

Pursuant to Section 2-324(a)(6), it is noted that an appointed City Official is not prohibited from engaging in private employment or business on his or her own time as a private citizen and/or where city business is not involved, subject to his or her disclosing such private employment or business on the public record before any matter on which he or she may be called upon to act in his or her official capacity. However, it further provides that he or she shall refrain from voting upon or otherwise participating in debate on any such matter in which he or she has directly or indirectly a financial or personal interest. "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. Section 2-322.

Section 2-324(a)(8) applies as it provides in part that no official of the City shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration or advantage beyond that which is available to every other citizen.

Mr. Kalczynski in his response, cites and principally relies in support of his position on Section 2-324(a)(9), which provides as follows: "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."

Section 2-324(a)(10) pertains to the determination of conflict of interest, and states in pertinent part in subsection a. thereof that a conflict of interest exists if the City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as employee, etc., 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 governmental duties. "Financial interest" means any interest in money, property or thing of value or benefit. Section 2-322. "Personal interest" means, in part, any interest arising from any business association. Section 2-322.

Both Messrs. Hohendorf and Kalczynski cite and rely upon subsection (b) of Section 2.324, pertaining to full disclosure. Section 2-324(b)(1) pertains to the responsibility to disclose, as follows: "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."

Section 2-324(b)(2) pertains to the disclosure of conflict of interest and disqualification, as it provides in pertinent part in subsection (a) 2.: "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: 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."

Subsection b. of Section 2-324(b)(2) is also informative herein, and it provides that: "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 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 should refrain from discussion, deliberation, action or voting thereon."

Individuals have multiple roles in their daily lives, and because of same they inherently possess many different interests and loyalties. These interests may compete at any given time. Such conflicts are unavoidable as they are a part of life. As stewards of the public trust, City Officials are required to put the public's interest before their own. Impropriety occurs when the City Official who is faced with conflicting interests puts his or her personal or financial interest in priority to the public interest.

As City Officials have lives outside work, and thus conflicts of interest are likely to exist, if they cannot be avoided they must be disclosed and managed in a planned way. It is important to understand that:

- a. The appearance and perception of a conflict of interest is as important to manage as an actual conflict;
- b. Conflicts of interest are usually personal, and therefore must be managed by the individual involved, however the City has the responsibility for implementing policies, processes and/or systems to assist City Officials to recognize conflicts of interest and deal with them.
- c. City Officials should know the City's conflict of interest ordinance and the Ethics Board procedures, and actively facilitate discussion about how to manage conflicts of interest before they happen and assisting others to manage these as they arise; and
- d. City Officials should feel confident that they can discuss issues of conflict with their colleagues, and that the climate of discussion will be one of assistance and support.

One of the aims of the Ethics Ordinance is to regulate conflict of interest in City government. City Officials are expected to put service to the public ahead of personal interests. The ordinance is intended to prevent officials from making decisions in circumstances that could reasonably be perceived as violating this duty of office. Identifying and resolving conflict of interest situations is crucial to good governance and maintaining trust in City government. Citizens have increasing expectations that government should deliver higher standards of integrity. Conflict of interest should become a significant consideration of those who occupy any position of trust. If conflicts of interest are not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, and government.

Conflicts between private interests and public duties of City Officials must be correctly identified, appropriately managed, and effectively resolved. Left unresolved, conflict of interest can result in corrupt conduct, abuse of public office, misconduct, breach of trust, or unlawful action. Also, public confidence in the integrity of City government can also be seriously damaged. Maintaining trust is a central integrity issue for government and individual officials. Trust can be protected and improved, by making sure that there is no improper connection

between City Officials' functions and their private interests, including the interests of related persons or organizations.

Conflicts of interest interfere with the basic ethical principle of fairness, which is treating everyone the same. A City Official should not take unfair advantage of his or her position by voting on a matter that could benefit him or her at the expense of others. A City Official may honestly believe he or she is not being duly influenced by their personal stake in an issue. To the contrary, he or she may feel that his or her interest in the matter gives him or her a special insight into the subject. He or she may argue that he or she understands the problems of a downtown business because he or she owns or manages one. Nevertheless, it is very difficult for individuals to determine whether they are being fair when their self-interest is involved. Therefore, the Ethics Ordinance prohibits such partiality. The ordinance is aimed at the perception, as well as the reality, that a City Official's personal interests may influence a decision. Even the appearance of impropriety undermines the public's trust that the process is fair. See Sections 2-321 and 2-323.

A City Official is not absolved of his or her responsibility merely by being transparent about his or her stake in the issue. It is insufficient for City Officials to make conflicts public. They must remove themselves from the decision-making process altogether. This includes discussion as well as voting. Abstention is only half of the requirement. For further guidance relative to disclosure and/or recusal, see this Board's Advisory Opinions 2003-03 and 2015-06.

An interest may be personal as well as financial. A personal interest, would especially exist if it improves one's standing in the organization. A personal interest which could constitute a potential conflict of interest situation may include a position held in a business, community or organization. Public office should not be used to punish one's personal and/or political enemies. Rather, City Officials are expected to understand the meaning of the Ethics Ordinance, and comply with same. Every City Official but must be alert to, and responsive to, actual and perceived conflicts of interest. They can avoid or preempt conflicts of interest by understanding and exhibiting the behaviors required of a City Official. City Officials must take personal responsibility for identifying and resolving problem situations. A beneficial discussion and analysis of this topic is set forth in this Board's Advisory Opinion 2012-01.

The presence of a conflict of interest is independent of the occurrence of impropriety. A conflict of interest exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that a decision may be unduly influenced by a secondary interest, and not on whether a particular individual is actually influenced by a secondary interest. "Secondary interest" includes personal benefit and is not limited to only financial gain but also such motives as the desire for professional advancement, or the wish to do favors for others from "an interest arising from blood or marriage relationships or any business association." Section 2-322.

An apparent conflict of interest situation can be as seriously damaging to the public's confidence in a City Official, or the City, as an actual conflict. An apparent conflict of interest should therefore be treated as though it were an actual conflict, until such time as the doubt is removed and the matter is determined, after investigation of all the relevant facts.

City Officials are expected to maintain and strengthen the public's trust and confidence in the City, by demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the U.S. and State of Michigan Constitutions and laws, and seeking to advance the public good at all times. City Officials are expected to make decisions and act without consideration of their private interests. Public service being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of professional integrity.

The proper objective of the effective conflict of interest policy is not the simple prohibition of all private interests on the part of City Officials, even if such an approach were conceivable. The objective should be to maintain the integrity of official policy and administrative decisions and of City management generally, recognizing that an unresolved conflict of interest may result in abuse of public office.

A too-strict approach to controlling the exercise of private interests may conflict with other rights, or be unworkable or counterproductive in practice, or may deter some people from seeking public office altogether. Therefore, the City's Ethics Ordinance seeks to strike a balance, by identifying risks to the integrity of the City Officials, prohibiting unacceptable forms of conflict, managing conflict situations appropriately, making the City and individual officials aware of the incidence of such conflicts, and insuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations.

An "apparent" conflict of interest exists where it "appears" that a City Official's private interests could improperly influence the performance of his or her duties but this is not in fact the case. A "potential" conflict arises where a City Official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

A City Official should dispose of, or restrict the operation of, personal interests or private gain that could compromise official decisions in which they participate. Where this is not feasible, a City Official should abstain from involvement in official decisions which could be compromised by their personal interests and affiliations, and private gain.

In summary, City Officials are expected to:

- a. Act in a manner that will bear the closest public scrutiny. This obligation is not fully discharged simply by acting within the letter of the law; it also entails respecting broader public service values such as disinterestedness, impartiality and integrity;
- b. Act at all times so that their integrity serves as an example to other City Officials and the public;

- c. Accept responsibility for identifying and resolving conflicts in favor of the public interest when a conflict does arise; and
- d. Demonstrate their commitment to integrity and professionalism through their application of effective conflict of interest policy and practice.

The hearing in the instant case brought to light that there is a need for City Officials and boards to further acquaint themselves with the City's Ethics Ordinance and this Board's Rules of Procedure. So as to further engender an organizational culture which is intolerant of conflicts of interest:

- a. The City should continue to encourage the effective control and management of conflict of interest situations;
- b. The City should continue to encourage City Officials to disclose and discuss conflict of interest matters;
- c. The City should continue to create and sustain a culture of open communication and dialogue concerning integrity and its promotion; and
- d. The City should continue to provide guidance and training to promote understanding of the Ethics Ordinance.

The City has to date worked to ensure understanding of the Ethics Ordinance, including without limitation:

- a. Publicized the Ethics Ordinance, Rules of Procedure, and Opinions;
- b. Ensured that the rules and procedures are available;
- c. Provided guidance with information, advice, and training seminars;
- d. Provided assistance to City Officials who are in doubt about the application of the Ethics Ordinance, and widely publicize how to obtain such advice; and
- e. Identified preventative measures that deal with conflict situations, including recusal.

CONCLUSION

It does not appear that Mr. Kalczynski had or has an "actual" conflict of interest herein. Yet, as evidenced by the filing of the Complaint herein there may have been an "apparent" conflict. Mr. Kalczynski may continue to participate on the APC in discussions and voting in association with the Daxton Hotel project provided that he act in furtherance of the public good, in compliance with his duties to the APC, and consistent with the requirements of the Ethics


Ordinance. He must be impartial. He must also be cognizant of the appearance of a conflict of interest, as well as the public's perception, whether or not specifically prohibited by Section 2-324. The ordinance "is intended to be preventative."

As the ordinance requires voluntary disclosure to assist in identifying the difference between relationships that require recusal and those which do not, he should going forward (a) review the APC agenda and decide whether there is an Ethics Ordinance issue as to any item, (b) if there is a current relationship that involves a personal or financial interest which would constitute an apparent conflict of interest or more, he must recuse himself from participation, (c) if there is a prior relationship, he must decide if he can be impartial, (d) if he cannot be impartial, he must recuse himself, and (e) if he believes he can be impartial, he must disclose the relationship to the APC at the public meeting before participating and explain why recusal is unnecessary. The APC, as a board, can then determine by vote whether his recusal is required. If the vote is not unanimous, the ordinance issue should first be sent to the Board of Ethics for determination.

Approved:



John J. Schrot, Jr.
Acting Chairperson



James D. Robb
Member



Sophie Fierro-Share
Member