

CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
March 15, 2021
1:30 PM
VIRTUAL MEETING ON ZOOM
MEETING ID: 996 5685 2194

I. CALL TO ORDER

Chairperson Sophie Fierro-Share

II. ROLL CALL

Alexandria Bingham, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of February 22, 2021

IV. UNFINISHED BUSINESS

None

V. NEW BUSINESS

- A. Consideration of Draft Opinion 2021-01: Request for an Advisory Opinion from Kucharek.
- B. Discussion on creating guidance for situations that could be considered a conflict of interest.

VI. PUBLIC COMMENT

VII. 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](tel:248-530-1880) por lo menos el día antes de la reunión pública. (Title VI of the Civil Rights Act of 1964).

I, Alexandria Bingham, 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 March 10, 2021.

Alexandria Bingham

**City of Birmingham
Board of Ethics Minutes
February 22, 2021
151 Martin, Birmingham
Virtual Meeting ID: 996 5685 2194**

I. CALL TO ORDER

Chair Fierro-Share called the meeting to order at 1:30 p.m.

II. ROLL CALL

Present: Sophie Fierro-Share, Chair (located in Birmingham, MI)
James Robb, Board Member (located in Birmingham, MI)
John Schrot, Board Member (located in Birmingham, MI)

Absent: None

Also Present: City Attorney Kucharek

Administration: City Clerk Bingham, Peter Gojcay - Legal Counsel from Beier Howlett

III. APPROVAL OF MINUTES

At the bottom of page one, Member Schrot recommended adding 'as personal representative' after 'on his behalf', and changing 'the estate' to 'his mother's estate'.

Members Schrot and Robb then recommended:

- Adding 'Board in drafting the' between 'inform the' and 'advisory opinion' on page three;
- In the next sentence, changing 'informing' to 'involved with';
- In the third to last paragraph on page three, changing 'a proposed approach' to 'propose an approach'; and,
- In the second to final paragraph on that page, removing 'public,'.

MOTION: Motion by Member Schrot, seconded by Member Robb:
To approve the minutes of February 15, 2021 as corrected.

ROLL CALL VOTE:	Ayes,	Member Schrot Member Robb Chair Fierro-Share
	Nays,	None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. Consideration of Matter 2021-02: Request for Advisory Opinion (Library Board - Craft)

Library Director Craft reviewed her request for an advisory opinion.

Member Robb informed the Ethics Board that he had served as the trustee for the estate of Birmingham resident James Miller. He noted that the estate of Mr. Miller left a donation of artwork to the Birmingham Library. Member Robb explained that during his facilitation of the donation he had occasion to interact with Library Director Craft and other Library Staff. He said he did not believe those interactions represented a conflict-of-interest.

Neither Chair Fierro-Share or Member Robb believed Member Schrot's work with the Library on behalf of Mr. Miller's estate represented a conflict-of-interest.

Greg Weddell, the Library Board applicant referenced in Library Director Craft's request for an advisory opinion, withdrew his application for the Library Board position via email on February 16, 2021. That email was circulated to the Ethics Board members prior to the present meeting.

Member Robb, observing that it would have been his turn to write the advisory opinion, said he had been thinking about the matter. He said that it has been the Ethics Board's policy since its inception not to opine on hypothetical cases since each case's findings are so fact-dependent. He said this matter became a hypothetical case when Mr. Weddell withdrew his application. He said that in lieu of an advisory opinion, the Ethics Board could discuss about what aspects of City policy and ordinance might come into play in a broadly similar case.

Member Schrot concurred with Member Robb.

Member Robb stated he was not sure that Weddell, in his hypothetical appointment to the Library Board, would have qualified as a City Official per the Ethics Ordinance. He said that if the Ethics Board had chosen to proceed in writing an advisory opinion, it would have been most appropriate for the request for the advisory opinion to have been submitted by the Library Board itself.

Member Schrot concurred with Member Robb that the request would have been most appropriately submitted by the Library Board, and that it is incumbent upon the members of the Library Board to familiarize themselves with the Ethics Ordinance. Since the Library Board members would have voted on Mr. Weddell's potential appointment, Member Schrot noted the Library Board members would have had to be aware of the relevant ethical considerations and how the appointment may have affected morale or public perception. This matter may not have resulted in an inherent conflict-of-interest as long as all possible aspects were discussed by the Library Board in the course of considering the appointment.

Given that Member Robb was not sure a Library Board member is a City Official, Member Robb said he would have been concerned about the Ethics Board's jurisdiction in considering the matter. He noted that the Ethics Board does have the right to alter the rules of procedure when it is in the interest of the ordinance.

Since he was unsure about jurisdiction, Member Robb said he consulted the City Charter. He said that his reading of the City Charter, which he cautioned was not binding on the City Attorney, was that the City Charter would not have prohibited Mr. Weddell's appointment. Member Robb said he also had not seen any other City policy that would have prohibited Mr. Weddell's appointment.

Member Robb ventured that since the City's electorate would have the right to elect Mr. Weddell to the Library Board, they would also have the right to have him appointed to the Library Board.

Both Member Robb and Member Schrot agreed that the main concerns stemming from Mr. Weddell's appointment would have been the possibility, or public impression, of preferential treatment, improper influence, bias or favoritism from Mr. Weddell in his power as a Library Board Member towards his spouse who is currently an employee of the Library.

Member Schrot said he reviewed the Library and the Library Board's policies regarding potential nepotism. He said in this matter the Library Board would have been forced to reconcile the existence of potentially competing sets of values: trying to find the most competent, loyal, and enthusiastic Board members, and the fact that people are often loyal to their family members in a way that can cause conflict with the first set of values. He said the Library Board would have needed to consider how the existence of that potential conflict would have affected the Library and the Library Board.

Member Schrot commented that both a potential conflict-of-interest in this case or the appearance of it could have minimized the effectiveness of the Library Board's ability to carry out the Library's business. While he said he found no policy or ordinance that would have precluded the appointment, he said he would recommend Library Director Craft consult with the City Attorney to find out if there would have been any conflict-of-interest or any applicable self-dealing laws. He noted that in cases where law, policy or ordinance do not prohibit something, but a matter still seems potentially nebulous, it is often appropriate to reach out to the Ethics Board for an advisory opinion on whether the action would be ethical, just as Library Director Craft had done here.

Chair Fierro-Share and Member Schrot both commented that the frequency of Ms. Weddell's working at the Library would have also factored into the Ethics Board's consideration. They agreed there might be different findings for a substitute librarian and a full-time librarian, for instance.

If Mr. Weddell had to frequently recuse himself due to this potential conflict-of-interest, it might have negatively impacted the work of the Library Board. Both Chair Fierro-Share and Member Schrot noted this was another fact the Library Board would have had to consider in terms of Mr. Weddell's potential appointment.

Chair Fierro-Share noted that the Ethics Ordinance provides no direct guidance on a case such as this.

Member Robb agreed but said such direct guidance in the ordinance may not have been necessary given the requirement of 'independent action' and other requirements of people who are appointed to City committees. He said that if a similar situation were to arise in the future, it would be appropriate for the Library Board to request an advisory opinion from the Ethics Board.

Member Robb also commended Library Director Craft for seeking out an advisory opinion in this case.

Library Director Craft thanked the Ethics Board, said she would pass the information onto the Library Board, and said she would look into updating the Library and the Library Board's policies to better address similar questions in the future.

Member Robb advised Library Director Craft that she would likely have to consult the City Attorney to learn the appropriate process for altering those policies.

B. Consideration of next scheduled meeting

Chair Fierro-Share informed the Ethics Board she wanted to discuss some matters around conflicts-of-interest at the next meeting,

The Ethics Board agreed to meet on March 15, 2021 at 1:30 p.m.

VI. PUBLIC COMMENT

None.

VII. ADJOURN

Chair Fierro-Share adjourned the meeting at 2:25 p.m.

Alexandria Bingham, City Clerk

DRAFT

**CITY OF BIRMINGHAM
BOARD OF ETHICS
REQUEST FOR ADVISORY OPINION 2021-01**

DECISION

MARCH 8, 2021

I. STATEMENT OF FACTS

Mary Kucharek seeks an advisory opinion from the Board of Ethics concerning a potential conflict of interest relative to the exercise of her responsibilities and duties as an official of the City of Birmingham.^{1, 2}

Ms. Kucharek is an equity partner with the law offices of Beier Howlett, P.C., a law firm that has represented the City of Birmingham for approximately the past 60 years. She has disclosed a personal relationship with one of the City's consulting engineers, Michael McDonald. Mr. McDonald is a managing partner at the engineering firm of Hubbell Roth Clark (hereinafter "HRC"). HRC has been providing engineering services to the City for at least the past 60 years. Mr. McDonald is a member of the board of directors of HRC, which manages the company. Mr. McDonald oversees the work of Jim Surhigh, who is the primary person responsible for oversight of the work for the City of Birmingham with its engineering needs. HRC is party to a consulting contract with the City, and from time-to-time bids on particular jobs.

HRC's contract with the City is periodically reviewed, and no contract is entered into without the approval and review of the City Commission.

Historically, the law offices of Beier Howlett, P.C. and engineering consultants HRC have worked side-by-side in order to best advise the City on its legal needs and engineering needs. The services of Beier Howlett and HRC have been one of parallel professional relationship. Beier Howlett is not responsible to hire or fire HRC, nor is it responsible for engaging in a contract with HRC. Also, Beier Howlett is not responsible for developing any RFP for projects, nor awarding those to HRC. Rather, it is within the purview of the City Manager, with final approval of the City Commission, to engage HRC's services through awarding of contracts or of projects for professional engineering consultation.

Ms. Kucharek and Mr. McDonald subsequent to their dating relationship became engaged to marry as of January 15, 2021. They plan to marry sometime later in 2021. Ms. Kucharek came before this Board to provide full disclosure of her personal relationship with this consulting firm member who also serves the City of Birmingham.

Ms. Kucharek represented to this Board that if at any time HRC's contracts and/or contract review, etc. need to be legally reviewed for the City, she will have another member of the Beier Howlett firm review same so that she is always separated from the contract services associated with HRC. At the hearing before this Board, one of Ms. Kucharek's colleagues at Beier Howlett, Peter Gojcaj, appeared and his qualifications were represented as being

¹ At time of submission of the Request, Ms. Kucharek held the title of Assistant City Attorney, but at present is the City Attorney.

² Ms. Kucharek references that the requesting party(s) of this advisory opinion is she and City Manager Thomas Markus.

sufficient to accomplish same. Beier Howlett attorney Michael Gibbons was also mentioned as a stand-in. Ms. Kucharek represented that Beier Howlett does nothing more than review the HRC contract with the City for form, and does not negotiate with HRC. Should that become necessary, Ms. Kucharek stated that she would not be involved with same, but rather another law office member would do so, in an effort to avoid even in the appearance of impropriety. Ms. Kucharek represented that City Manager Markus was aware of, and comfortable with, her relationship with Mr. McDonald.

II. DISCUSSION

The Ethics Ordinance of the City of Birmingham is designed in part to “provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants.” Ethics Ordinance §2-320.

The ordinance further provides that public officials 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.

This section of the ordinance (§2-320) mandates that City officials, such as Ms. Kucharek, must avoid conflicts between their private interests and the public interest. See Decision on Advisory Opinion 2015-05 (Harris). Upon marriage, Ms. Kucharek will have heightened responsibilities in relation to the ordinance as she will thus have “personal interest” and “immediate family” considerations. See §2-322 and Decision on Advisory Opinion 2018-02 (Kalczynski).

Ms. Kucharek correctly acknowledged those responsibilities as in her Request for an Advisory Opinion she cited §2-321-Responsibilities of Public Office in the Ethics Ordinance, as follows: “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.” See Decision on Advisory Opinion 2012-01 (Nickita).

The Board felt it important in its deliberation of this matter to discuss §2-323 pertaining to the intention of the Code, and specifically the following subsections:

- (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 Board further discussed and advised Ms. Kucharek of the following subsections of §2-324(a) pertaining to conflicts of interest, which she should be especially vigilant of:

- (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.
- (4) No official or employee of the city shall directly or indirectly, solicit or accept any gift or loan of money, goods, services or any other thing of value for the benefit of any person or

organization, other than the city, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties.

(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.

(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. See Decision on Complaint 2007-04 (Vandermeer).

While this Board determined that there is no actual or apparent conflict of interest in the instant case, there is the potential for same; and, for that reason it pointed out subsection 10 of 2-324(a) (pertaining to a determination of conflict of interest), which provides that a conflict of interest exists if:

a. The city official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of any 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. See Decision on Advisory Opinions 2018-02 (Kalczynski) and 2009-01 (Vosburgh).

Finally, the Board referenced §2-324(b)(2), pertaining to the disclosure of any conflict of interest and disqualification. See Decision on Advisory Opinion 2012-02 (Valentine).

As a public agency attorney, Ms. Kucharek must meet a number of requirements (including ethics requirements) to be able to practice law and to continue practicing law in Michigan. Certain of those requirements are features of state law, and others are rules adopted by the State Bar of Michigan. She must adhere to the Rules of Professional Conduct set forth by the State Bar of Michigan and approved by the Michigan Supreme Court. These requirements are in addition to ethics law requirements imposed on public officials. As is the case with rules relating to ethics, these are minimum standards. These rules impose a professional obligation for an attorney to counsel compliance with the law. The City's Ethics Ordinance and its

principles encourage a municipal lawyer to promote the rule of law and to rely on sound legal analysis in providing advice. Promoting a culture of ethics and fidelity to the law is every city official's responsibility in public service.

Ms. Kucharek's obligation is to put the public's interest first. The public may question whether her aforesaid personal relationship affects her ability to be objective, however, she appears to have effectively addressed that within the context of her law firm by agreeing to and being able to step aside from certain situations that may generate such an appearance. Ethical issues arise any time the public might reasonably question whether a romantic/marital relationship results in preferential treatment. Professionalism and regard for others dictate that both Ms. Kucharek and her fiancé/husband be discreet about their relationship. This includes treating each other as if the relationship did not exist in professional situations. Further, they should avoid any tensions or arguments in the work environment, as well as refrain from using the City's communication systems for personal communications.

As the City's Ethics Ordinance suggests, public service involves sacrifice. Ms. Kucharek's responsibilities to the City to avoid risks and maintain her objectivity, as well as the perception of objectivity, trump her personal interests. Ms. Kucharek's suggested safeguards should successfully avoid self-dealing and/or the public's perception of same.

III. CONCLUSION

The Board of Ethics concludes that Ms. Kucharek and Beier Howlett could sufficiently enact enough of a virtual wall between City Attorney Kucharek and other attorneys at the firm who may in the future handle matters on behalf of the City of Birmingham regarding HRC. There is precedent in both general legal practice and the City's Board of Ethics Opinions for such an ethical wall being adequate to avoid conflicts of interest that might otherwise arise. Should a particularly adversarial matter arise between the City and HRC, such as one that might result in litigation, the City likely should not be represented by Beier Howlett for that matter, and should retain outside legal representation.

Ms. Kucharek will have a continuing obligation to disclose to the City any potentially emerging conflicts of interest. In order to avoid creating the perception of a conflict of interest, Ms. Kucharek and Mr. McDonald should abstain from any nonprofessional behavior in City-related proceedings, as well as abstaining from the use of any City technology to conduct nonprofessional correspondence with each other.

The Board of Ethics commends Ms. Kucharek for having realized that she may have a potential conflict of interest and for bringing it to the Board for this Advisory Opinion.

Sophie Fierro-Share, Chairperson

James D. Robb

John J. Schrot, Jr.