

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
AMENDED
JUNE 15, 2022
MUNICIPAL BUILDING, 151 MARTIN
2:00 PM**

I. CALL TO ORDER

Chairperson John Schrot

II. ROLL CALL

Alexandria Bingham, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of November 16, 2021

IV. UNFINISHED BUSINESS

VI. NEW BUSINESS

~~A. Consideration of Advisory Opinion Request 2022-01—Requested by City Manager Thomas M. Markus Re. Samuel Oh on the Triangle District Corridor Improvement Authority~~

B. Consideration of Advisory Opinion Request 2022-02 - Requested by City Manager Thomas M. Markus Re. Bert Koseck on the Planning Board

VII. PUBLIC COMMENT

VIII. ADJOURN

Should you wish to participate, you are invited to attend the meeting in person or virtually through ZOOM: <https://us06web.zoom.us/j/99656852194> Meeting ID: 996 5685 2194
You may also present your written statement to the Board of Ethics, City of Birmingham, 151 Martin Street, P.O. Box 3001, Birmingham, Michigan 48012-3001 prior to the meeting.

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, 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 May 18, 2022.

Alexandria Bingham

**City of Birmingham
Board of Ethics Minutes
November 16, 2021
151 Martin, Birmingham**

I. CALL TO ORDER

Chair Fierro-Share called the meeting to order at 2:00 p.m.

II. ROLL CALL

Present: Sophie Fierro-Share, Chair
James Robb, Board Member
John Schrot, Board Member

Absent: None

Administration: City Clerk Bingham, City Manager Tom Markus, City Attorney Mary Kucharek

III. APPROVAL OF MINUTES

MOTION: Motion by Mr. Robb, seconded by Mr. Schrot:
To approve the minutes of March 29, 2021 as submitted.

VOICE VOTE: Ayes, Mr. Robb
Mr. Schrot
Chair Fierro-Share
Nays, None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. Selection of new chair

MOTION: Motion by Chair Fierro-Share, seconded by Mr. Robb:
To nominate Mr. Schrot as the new Chair of the Board of Ethics.

VOICE VOTE: Ayes, Chair Fierro-Share
Mr. Robb
Mr. Schrot
Nays, None

B. Consideration of Advisory Opinion Request 2021-04

Chair Schrot explained the process that would be followed for reviewing Case 2021-04. He then explained the matter to be reviewed. Chair Schrot asked his fellow Board members to opine as

to whether the Board was solely acting as the City Manager’s designee in this matter, or whether the Board should also be treating this matter as an ethics complaint.

The Board concurred that that the public’s speaking time should be limited to three minutes each.

Mr. Robb said the Board’s responsibility in this matter was solely to act as the City Manager’s designee. He noted there was no ethics complaint filed and no request for an ethics advisory opinion. He stated the City Manager requested the Board review the matter according to the City’s policy for racial and ethnic conflict, and not under the ethics ordinance. Mr. Robb said he concurred with Chair Schrot’s statement that the Board was being tasked with determining whether there were sufficient allegations to warrant the Board to conduct hearings or issue an advisory opinion.

Ms. Fierro-Share noted that while this discussion would not be conducted under the guidance of the ethics ordinance, the Board would undertake a careful review.

Chair Schrot concurred with Mr. Robb in saying that this matter did not constitute an ethics ordinance complaint, noting that the requisite documentation for an ethics complaint had not been submitted. He noted that this matter, rather, pertained to an alleged incident involving racial or ethnic conflict. He concurred with Ms. Fierro-Share’s statement as well.

MOTION: Motion by Mr. Robb, seconded by Ms. Fierro-Share:
To accept the designation from City Manager Markus to address advisory opinion request 2021-04.

VOICE VOTE:	Ayes,	Mr. Robb Ms. Fierro-Share Chair Schrot
	Nays,	None

Chair Schrot said the Board should first clarify what the Plan for the City of Birmingham’s Response to Incidents Involving Racial or Ethnic Conflict (the Plan) means by an ‘incident’.

Mr. Robb noted the term was not defined in the Plan and said the Board should understand ‘incident’ in accordance with its customary usage.

The Chair said the Board should then review the complaint, determine whether they believed an incident involving racial or ethnic conflict occurred, and should determine whether a hearing or advisory opinion to the City Manager was warranted.

Mr. Robb thanked the members of the public for submitting letters regarding this case. He noted that there was no allegation that Commissioner Baller violated the ethics ordinance, that he made a statement that was facially antisemitic, or that an incident involving racial or ethnic conflict occurred. Mr. Robb stated the allegation against Commissioner Baller was that he used language that is typically used by people who circulate antisemitic tropes. He noted that the allegation did not say Commissioner Baller used an antisemitic trope.

Mr. Robb explained that he utilized resources from the Anti-Defamation League (ADL) and the Louis D. Brandeis Center (Brandeis Center) in his review of this case. He stated that a fact sheet

from the Brandeis Center lists elements of antisemitic discourse, and said that certain kinds of references to money or wealth can constitute antisemitic discourse. He said the Brandeis Center specified that those references usually more specifically include allegations of greed at the expense of others, which he said was significant.

Mr. Robb said he was not inclined to find that Commissioner Baller used an antisemitic trope. He stated that the words in question are commonly used in political discourse and in wider society. Mr. Robb said he has used those words and heard them used in his career as a business lawyer. He said he was unable to find an indication that Commissioner Baller used the words in any way other than how those words are commonly used in politics or business on the basis of the record.

Mr. Robb stated that prior to Carolyn Normandin's letter on behalf of the ADL, he had been unaware that the donors to Mr. Bloom's campaign, as named by Commissioner Baller, were of the Jewish faith. Mr. Robb noted that said donors were not identified as such by Commissioner Baller. Mr. Robb stated that the discourse was not improper since knowing who supports a candidate allows voters to know a bit more about the candidate. Mr. Robb stated that criticism of political candidates for fundraising practices is not uncommon and is not limited to candidates of any creed, ethnicity or background.

Based on this information, Mr. Robb contended that the Board would have to extrapolate from Commissioner Baller's writings to establish that an incident involving racial or ethnic conflict occurred. Mr. Robb said he did not see that there were sufficient allegations of complaint to warrant the Board conducting hearings or offering an advisory opinion on whether an incident of racial or ethnic conflict occurred.

Ms. Fierro-Share said that one can never be sure how one's words will be interpreted, and that this case may be an example of that. She said there are some words that are unequivocally racist, and other words that are used in many contexts and are not inherently ethnically derogatory. Finding Commissioner Baller's language to be in the latter category, Ms. Fierro-Share said she agreed with Mr. Robb that the Board could not establish that Commissioner Baller had racially or ethnically biased intentions, or that an incident involving racial or ethnic conflict had occurred.

Ms. Fierro-Share said she did feel that the speech in question was hurtful and unfortunate. She said that it hurt many people in the process.

Chair Schrot stated that he also looked at the ADL's resources to get a better sense of the allegations and antisemitic tropes. He concurred with Mr. Robb and Ms. Fierro-Share that an incident of racial or ethnic conflict did not occur in this case. Based on this, he also concurred with his colleagues that there was no basis for holding a hearing or issuing an advisory opinion. He said it seemed that this matter would be best addressed at the ballot box. He noted that when people donate to a political campaign it does become a matter of public record.

Chair Schrot then noted that the ethics ordinance has requirements for the behavior of public officials. He noted that this was addressed in the Board's Case 2020-01 opinion as well.

Chair Schrot, Mr. Robb, and Ms. Fierro-Share said the City should pursue the Board's recommendations from Case 2020-01 to establish a social media policy and to provide guidance to public officials on when they should offer a disclaimer for their communications. There was Board consensus that having clearer policies would better allow the Board to determine when those policies have been violated.

Chair Schrot said he did not profess to know the legalities of devising a social media policy, and that the City Attorney would have to review that. He provided documents regarding potential policies to his fellow Board members, and said he would also provide them to the City Attorney and the City Clerk to include in the record.

Mr. Robb said the Board could also potentially assist in crafting a social media policy and guidance on when public officials should offer disclaimers.

Chair Schrot invited public comment.

VI. PUBLIC COMMENT

David Bloom, Ed Schulak, Ann Gross, Donna Klein, Paul Reagan, and Jane Schulak expressed the harm they saw done by Commissioner Baller's writings both in email and on social media.

Mr. Bloom explained that while he was not accusing Commissioner Baller of being antisemitic, he was accusing him of using antisemitic tropes to undermine Mr. Bloom's 2021 campaign for the office of City Commissioner.

Mr. Schulak and Ms. Gross said that the Board's understanding of its task was perhaps too narrow, and that the Board should review Commissioner Baller's conduct vis-a-vis his written communications more generally.

Ms. Klein said that Commissioner Baller had not reformed his approach to writing after Case 2020-01. She asserted that Commissioner Baller's statements seemed to be dog-whistles, which are racially- or ethnically-biased views meant to be imperceptible to the general public but recognizable to those who hold similarly biased views. She said the City should be taking the correspondence from the ADL more seriously, and noted that while a number of Jewish residents were expressing concern, three non-Jewish Board members were finding that there was no racial or ethnic incident. She said it should be sufficient to know that Commissioner Baller's correspondence was offensive to some residents. She encouraged the Board to rethink their stance.

Mr. Reagan said that if a separate complaint were raised regarding this matter under the ethics ordinance, he hoped that the Board would review the matter without prejudice as to their findings in the current case. He said that developing a social media policy would be superfluous since the ethics ordinance already adequately deals with public officials' communications. He asserted that the lines between being a Commissioner and citizen have been intentionally confused in Commissioner Baller's conduct and that the roles needed to be more clearly disentangled.

Ms. Schulak said Commissioner Baller was showing disrespect for his office, the City and the public. She said this incident did not represent how City officials nor the City should conduct itself.

VII. ADJOURN

Mr. Robb thanked the public for attending and for offering their perspective.

MOTION: Motion by Mr. Robb, seconded by Ms. Fierro-Share:
To adjourn the meeting at 3:12 p.m.

VOICE VOTE:	Ayes,	Mr. Robb Ms. Fierro-Share Chair Schrot
	Nays,	None

Alexandria Bingham, City Clerk

DRAFT



Case No. _____
(Assigned by clerk)

REQUEST FOR ADVISORY OPINION

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

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

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

Name Bert Koseck Phone Number (248) 302-4018

Address 2441 Dorchester, Birmingham, MI 48009
(Number, Street, City, State, Zip)

Position or Board (If Applicable) Planning Board Member

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

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

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

Revised 8/16/12

FOR OFFICE USE ONLY

Accepted by _____ Date _____



April 25, 2022

City of Birmingham Ethics Board
City of Birmingham
151 Martin Street
Birmingham, MI 48009

Re: Advisory Opinion

Dear Members of the Board:

It has come to my attention that Mr. Koseck, who is a Planning Board member for the City of Birmingham, has been working as an architect on behalf of Cannelle Patisserie located at 159 N. Eton St. Mr. Koseck has been on the Planning Board since October of 2009, and, therefore, is a City official or employee as defined at Sec. 2-322 of the Birmingham City Code of Ethics Ordinance.

"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."

Mr. Koseck began talking to the City Planning Department to discuss the process for proposed changes to the property, including the chance that it would have to have a site plan review before the Planning Board. He was also in discussions with the Planning Department concerning the City's policy with respect to building over a City utility easement. As time progressed, there was quite a bit of back and forth regarding the site plan review administratively and site plan review with the Planning Board. In January of 2022, the City staff conducted a site plan review for the application and discussed the project again with Mr. Koseck.

On approximately January 20, 2022, the Planning Department, through Mr. Brooks Cowan, had discussions with Mr. Koseck regarding the City's review. Mr. Koseck was argumentative telling Mr. Cowan what the Engineering Dept. said regarding what he could and could not do to the site. Most notably, however, Mr. Koseck told both Ms. Jana Ecker, Assistant City Manager, and Mr. Cowan that he showed his plans to Planning Board members and civil engineers, Scott Clein and Jason Emerine. Mr. Koseck told employees that Mr. Clein and Mr. Emerine believe the City should allow Mr. Koseck's proposal to be built above the utility easement. At this point, it had not been determined with finality whether Mr. Koseck would have to go before the Planning Board, and



the fact of the matter is he involved Planning Board members' input from behind the scenes, a Board of which he is an active member, to support his case which could be a violation of the Ethics Code Sec. 2-323(1), (2), (3) and Sec. 2-324(a)(5), (8) and subsection b(2).

There were continued efforts from Mr. Koseck to push the staff, with almost daily or every other day emails, to obtain administrative approval for the Cannelle project, attempting to bypass the need for the Planning Board review. He even requested a refund for the final site plan review application with the Planning Board which he is aware, as a Planning Board member, is not done. Frequently, Mr. Koseck was angry, raising his voice, and badgering the staff. Mr. Koseck went as far as to say, "You know I talked to Jason Emerine and Scott Klein about this who are professional engineers, and they think what engineering and HRC are doing is bullshit." Again, in potential violation of the aforementioned sections. Mr. Koseck, by speaking to Planning Board members before a public hearing did so in an attempt to gain a favorable decision, certainly in potential violation of Sec. 2-324(8). Many of the staff members felt as though they were being pressured to change their opinions for Mr. Koseck because he is on the Planning Board, again in potential violation of Sec. 2-324(8).

In reviewing the Code of Ethics, I am contacting the Ethics Board of the City of Birmingham to request an Advisory Opinion regarding the conduct of Mr. Koseck. Sec. 2-320(3), makes it clear that one is not to use a public office for personal gain. Further, recognizing Sec. 2-321 which states:

"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."

I believe the Code of Ethics has been written to ensure that every person acting on behalf of the City always does so with the utmost integrity and not have even the appearance of impropriety. I am concerned that Mr. Koseck is using his position as a Planning Board member in order to put through his project at Cannelle Patisserie without going through the proper procedure, thereby using his position as a member of the Board, duly appointed by the Commission, and as such may be in violation of Sec. 2-321, Sec. 2-323(1), (3), (4) and (5). His actions towards City staff and involving other Planning Board members behind the scenes are concerning to the City, and thereby in potential violation of Sec. 2-322 of the Birmingham Code of Ethics. Furthermore, Sec. 2-324(a)(2) states:

"(2) No official or employee of the city shall represent his or her personal opinion as that of the city."



By pursuing the staff to obtain administrative approval and going behind the scenes to other Planning Board members before a public hearing, Mr. Koseck is in potential violation of Sec. 2-324(a)(8), by using his official position. It could be argued that he may also be in violation of Sec. 2-324(a)(9)b. in that he is acting in a way that is not in compliance with the duty of his Board, but instead is utilizing his position in order to act against the Planning Board, for which he has been sworn to represent and make decisions on behalf of the Board (Attachment 1).

In conclusion, I bring the aforementioned facts to the Ethics Board requesting an Advisory Opinion as to whether or not sections of the Birmingham City Code of Ethics have potentially been violated by Mr. Koseck's actions.

I look forward to any questions you may have, and I will make myself available for a meeting as requested.

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

A handwritten signature in black ink that reads "Thomas M. Markus". The signature is written in a cursive style and is positioned above the printed name and contact information.

Thomas M. Markus, Birmingham
City Manager
tmarkus@bhamgov.org
(248) 530-1809

Date: 4-27-22

Attachment:

1. Affidavit

STATE OF MICHIGAN
COUNTY OF OAKLAND

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the constitution of this state and endeavor to secure and maintain an honest and efficient administration of the affairs of Birmingham, free from partisan distinction or control, and to perform the duties of the office of

Historic District Commission & Design Review Board

according to the best of my ability.

[Signature]
Signed

Subscribed and sworn to before me this 21st day of Sept, 2009

[Signature]
City Clerk Designee

STATE OF MICHIGAN
COUNTY OF OAKLAND

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the constitution of this state and endeavor to secure and maintain an honest and efficient administration of the affairs of Birmingham, free from partisan distinction or control, and to perform the duties of the office of

Public Arts Board

according to the best of my ability.

[Signature]
Signed

Subscribed and sworn to before me this 12th day of Oct, 09.

[Signature]
City Clerk

STATE OF MICHIGAN
COUNTY OF OAKLAND

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the constitution of this state and endeavor to secure and maintain an honest and efficient administration of the affairs of Birmingham, free from partisan distinction or control, and to perform the duties of the office of

Planning Board

according to the best of my ability.

[Signature]
Signed

Subscribed and sworn to before me this 12th day of Oct, 09.

[Signature]
City Clerk

Scott Clein
1556 Yosemite Blvd.
Birmingham, MI 48009

June 8, 2022

Board of Ethics
City of Birmingham
151 Martin Street
P.O. Box 3001
Birmingham, MI 48012-3001

RE: Advisory Opinion Request 2022-02

Honorable Members of the Board of Ethics:

I noticed on the City of Birmingham website that you will be holding a meeting on June 15, 2022, and that one of the agenda items involves an advisory opinion request related to Mr. Bert Koseck. As you no doubt know, I previous discussed this matter with the Assistant City Manager and City Attorney.

As of the date of this letter, I have not received a transcript or summary of that conversation. Furthermore, the full packet of information for your meeting is not available online and I am unable to know how my opinions are being presented. I am therefore writing to ensure that you have a clear understanding of my opinions on this matter to take under advisement as you see fit.

As a professional engineer, I have known Mr. Koseck on both a personal and professional level for more than a decade. We have both worked within the same industry in southeast Michigan and served together on the Planning Board. During that time Mr. Koseck has always shown himself to be ethical and professional.

As it relates to the specific project at hand, I must reiterate that my interaction with Mr. Koseck is best characterized as one professional reaching out to another to obtain their opinion. It was clear that Mr. Koseck was frustrated with the City's review process and asked my opinion of the validity of the review comments received from the Engineering Department during the permit process.

To be clear, at no to time did Mr. Koseck attempt to pressure me in any way. He did not ask for nor imply in any way that he wanted assistance with any approval. Mr. Koseck simply asked my opinion of the proposed project in the context of the engineering difficulties he was facing.

I hope this information is helpful to the Board. Please feel free to reach out to me if you have any questions. Thank you for your service to the City of Birmingham.

Respectfully,

Scott Clein

Cc: City Clerk, City of Birmingham
Bert Koseck

June 9, 2022

The City of Birmingham
Board of Ethics
151 Martin Street
Birmingham, MI 48009

Re: **City of Birmingham Board of Ethics Meeting – June 15, 2022**

Dear Board of Ethics:

On June 15, 2022, you will be meeting for the Consideration of Advisory Opinion Request 2022-02 regarding Mr. Bert Koseck of the Planning Board. This letter provides facts for your consideration at your meeting.

- In late Summer 2021, Mr. Koseck contacted me via phone to request information regarding sewer easements and what can and cannot be constructed in a sewer easement. I assumed that Mr. Koseck contacted me to request this information as I work professionally as a civil engineer.
- I responded to Mr. Koseck stating that it typically depends on the language included in that respective easement and what restrictions, if any, may be included in that language.
- Mr. Koseck's inquiry was specific to technical engineering related items and not planning related items that would be under the purview of the Planning Board.
- The Canelle Patisserie was on a Planning Board Agenda for January 2, 2022 but was postponed. The meeting minutes for the January 26, 2022 Planning Board Meeting indicate that both Mr. Koseck and I were absent at that meeting.
- The Canelle Patisserie was on the Planning Board Agenda for March 9, 2022, but the agenda indicated that it was postponed, and that item was never discussed at the meeting.
- The Canelle Patisserie was discussed at a Planning Board meeting (date uncertain) after a member of the City Planning Staff requested if the project could be handled administratively at the end of the meeting. At this meeting, the Canelle Patisserie was not formally on the agenda nor was the Canelle Patisserie included in the meeting packet. No advanced notice of this request was provided to the Planning Board. No formal vote took place.

The discussions that took place between Mr. Koseck and me were purely technical in nature and not framed around Planning Board related issues. In no way did it appear that Mr. Koseck was asking for my support of the project, attempting to influence my decision-making process, or gain a "favorable decision". Mr. Koseck has always acted professionally and ethically in every interaction I have ever had with him.

Sincerely,



Jason M. Emerine
720 Bennaville Ave
Birmingham, MI 48009