

**CITY OF BIRMINGHAM  
BOARD OF ETHICS AGENDA  
September 22, 2022  
MUNICIPAL BUILDING, 151 MARTIN  
9:00 AM**

**I. CALL TO ORDER**

James Robb, Chairperson

**II. ROLL CALL**

Alexandria Bingham, City Clerk

**III. APPROVAL OF MINUTES**

A. Approval of minutes of August 16, 2022

**IV. UNFINISHED BUSINESS**

**VI. NEW BUSINESS**

A. Review and approval of the draft Advisory Opinion 2022-01 – Requested by City Manager Thomas M. Markus Re. Samuel Oh on the Triangle District Corridor Improvement Authority

**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](http://www.bhamgov.org) on September 14, 2022.

Alexandria Bingham

**City of Birmingham  
Board of Ethics Minutes  
August 16, 2022  
151 Martin, Birmingham**

**I. CALL TO ORDER**

Chair Schrot called the meeting to order at 1:00 p.m.

**II. ROLL CALL**

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

Absent: None

Administration: City Manager Markus, City Clerk Bingham, Assistant City Manager Ecker,  
Planning Director Dupuis, City Attorney Kucharek

**III. APPROVAL OF MINUTES**

**MOTION:** Motion by Mr. Schrot, seconded by Ms. Fierro-Share:  
To approve the minutes of July 12, 2022 as submitted.

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

Chair Robb commended the City Clerk's Staff on the minutes of July 12, 2022.

**IV. UNFINISHED BUSINESS**

None.

**V. 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

Chair Robb provided introductory remarks and summarized the process that would be followed for reviewing the request. The Chair swore in both CM Markus and Mr. Oh.

CM Markus reviewed his request for an Advisory Opinion.

In reply to inquiries from the Board members, CM Markus stated:

- He felt Mr. Oh was using his title as a Triangle District Corridor Improvement Authority (TDCIA) member to advocate for a different Triangle District Plan than the one already adopted and to attempt to benefit his own property values;

- Mr. Oh also used his title to advocate for a petition with a false premise; and,
- He felt a City official should not use their title for advocacy of any position except for official business of the City.

Ms. Fierro-Share said she did not feel that it was unethical to be wrong. She said that unless Mr. Oh was intentionally stating his position to gain some advantage then it could be just an unfortunate misunderstanding.

CM Markus noted that Mr. Oh was informed by Staff that he was sharing incorrect information. CM Markus stated that Mr. Oh did not change the information he was sharing after receiving correct information from Staff.

In reply to further Board inquiry, CM Markus stated:

- Staff had conversations with Mr. Oh prior to Mr. Oh's circulating of a petition which sought to clarify Mr. Oh's factual misunderstandings about the TDCIA and the Triangle Plan;
- Mr. Oh indicated to Staff, at some point prior to circulating the petition, that he had a clearer understanding of the concerns about the differences of opinions.

Mr. Oh contested CM Markus' characterization of his opinions.

Chair Robb advised Mr. Oh that he would have time to testify as well. He explained that CM Markus was permitted to testify to his and Staff's observations.

The Chair swore in PD Dupuis.

At the request of the Chair, PD Dupuis described his position with the City and described his interactions with Mr. Oh. He stated:

- He had previously worked with Mr. Oh once on a separate issue. Mr. Oh attended the March 9, 2022 Planning Board meeting to give comments about the Triangle District, and PD Dupuis re-introduced himself and spoke with Mr. Oh in the hall prior to that meeting;
- The Chair of the Planning Board noted that the 2040 Master Plan draft did not recommend changes to the Triangle District, and recommended that Mr. Oh reach out to PD Dupuis for further clarification;
- Shortly after, Staff became aware of Mr. Oh's petition, and Staff assembled a Frequently Asked Questions (FAQ) document to offer some clarification about the Master Plan in general;
- PD Dupuis got the impression that Mr. Oh felt the FAQ was written directly in response to Mr. Oh. PD Dupuis noted that no mention of Mr. Oh was made in the document;
- PD Dupuis then engaged in an email exchange with Mr. Oh where PD Dupuis attempted to clarify the intent of the 2040 Master Plan in relation to the Triangle District;
- When he tried to clarify a specific misreading made by Mr. Oh of some images contained in the draft 2040 Master Plan, the email exchange became 'inappropriate' and CM Markus was notified of the issue; and,
- In mid-April 2022, Staff attempted to address previous misunderstandings about the Triangle Plan at the joint Commission-Planning Board meeting. Mr. Oh contacted Staff to ask for a copy of Staff's presentation, which PD Dupuis provided via CM Markus.

In reply to Board inquiry, PD Dupuis stated:

- He had not had any further interaction with Mr. Oh;

- Mr. Oh did not use any aspect of the draft 2040 Master Plan in making his arguments that was not already available to the public;
- To his knowledge, Mr. Oh used two images from the draft 2040 Master Plan for his petition without identification of the source of the images; and,
- As referenced in the petition, there is no 'Triangle District Redevelopment Plan'. He assumed that was referring to the plans in the draft 2040 Master Plan for the Triangle District.

CM Markus reiterated that, for the Triangle District, the draft 2040 Master Plan only recommended that the previously adopted Triangle Plan be followed. Staff sought to clarify that the draft 2040 Master Plan recommended no deviations from the Triangle Plan.

CM Markus explained the purposes of the draft 2040 Master Plan and the Triangle Plan and the relationship between the two. CM Markus noted that ACM Ecker was the Planning Director prior to PD Dupuis and suggested that she might be able to provide more information.

The Chair swore in ACM Ecker.

In reply to Board inquiry, ACM Ecker stated:

- Given the existence of area plans and a Master Plan, it was her impression that Mr. Oh confused the plans;
- The Triangle District Urban Design Plan (TDUDP) was adopted in 2007. This Plan recommended increasing heights in the Triangle District and after adoption the ordinance was updated to reflect those recommendations;
- Sometime between 2013 and 2015, the Corridor Improvement Authority was created and performed a study to look at parking and development in the Triangle District. There was a Development Plan with two parts: a TIF Plan and a Development Plan;
- The Development Plan sought to clarify how much parking would be required if all Triangle District properties were developed by-right to their full capacity, and then to clarify how many parking structures would be required to accommodate that development. This Plan did not make or recommend any changes to heights in the Triangle District;
- Mr. Oh used images from the draft 2040 Master Plan for his petition to indicate that the draft 2040 Master Plan recommended an increase in height in the Triangle District. In fact, those images only demonstrated what could be built by-right in the Triangle District according to the present ordinance, which has been in place since 2007;
- Mr. Oh should not use his weight and authority on the TDCIA for advocacy because it gives the impression that his opinions are representative of the City;
- The information Mr. Oh is circulating in regards to the Triangle District is false; and,
- While the number of different plans can make the information confusing, Mr. Oh was informed and corrected by Staff on a number of occasions and continued to circulate false information.

CA Kucharek reminded the Board that the dissemination of inaccurate information is detrimental to the City and is prohibited through the Ethics Ordinance. She added that the City has provided guidance to officials that their personal opinions should not cite their position with the City because it gives the impression that their personal opinions are held by the City.

Invited to testify by the Board, Mr. Oh stated:

- He has been a resident of the Triangle District since 2013, he does not own a business in the Triangle District, he joined the TDCIA in 2021, he was a member of a non-City board

previously but not a previous member of any City boards, and has not previously held any public positions;

- He did not speak with PD Dupuis in the hall before the March 2022 Planning Board meeting, nor did he have direct contact with PD Dupuis about this matter;
- He did briefly speak with PD Dupuis while seated before the March 2022 meeting began, stating that he was present to comment on the Triangle District and stating in reply to PD Dupuis that he did not like the exterior paint of a business located in the Triangle District;
- He has never had an in-person or telephone conversation with CM Markus. He wished that CM Markus has reached out to him, but he had not;
- He did not appreciate CM Markus characterizing his opinions since Mr. Oh has only interacted with the City through email and Mr. Oh's comments at the aforementioned Planning Board and Commission-Planning Board meetings; and,
- ACM Ecker was not privy to conversations Mr. Oh had with any Staff, and that her statements were based off of CM Markus' and PD Dupuis' statements.

With the permission of the Board, Mr. Oh passed out documents for their reference.

Chair Robb described the documents as the text of Mr. Oh's petition, a diagram that purports to indicate the current zoning in the Triangle District, a page described as the Birmingham Master Plan - 2007 version, page eight, page 52 from the draft 2040 Master Plan about the Triangle Overlay, and an excerpt of the previously referenced FAQ created by Staff.

Chair Robb noted Mr. Oh also provided the Board with a document that purported to be a set of Commission minutes from November 10, 2008 which contained the resolution which established the TDCIA and defined the development area.

In reply to Board inquiry, Mr. Oh continued:

- He felt that Staff was isolating parts of the texts from their contexts, resulting in misinterpretations of the texts by Staff;
- In the third paragraph of the petition, he used the first person singular to indicate that the petition contained his own personal beliefs and also described himself as a resident of the City and not as a member of the TDCIA;
- He included the first line in the petition, identifying himself as a member of the TDCIA, with the intent of providing full disclosure of potential conflicts of interest and of a significant fact;
- He did not appreciate CA Kucharek making motions while he was speaking;
- In document eight of the advisory request, Mr. Oh is described as a resident and not as a Board member;
- Identifying himself as the TDCIA in the petition could cause confusion for the reader, but he provided the information to try and minimize the amount of confusion possible;
- He did not intend to represent his opinions as those of the TDCIA or the City;
- He did not know of any residents who interpreted the text of his petition as the opinions of the TDCIA;
- He was unaware that the Ethics Ordinance indicated that he should not reference his title or position in this situation;
- He wrote the petition on behalf of some fellow Triangle District residents after discussion with said residents;
- He did not mention that the petition was written on behalf of some fellow Triangle District residents because he was trying to keep the text of the petition brief;

- Given the City's concerns that he represented his opinion as the City's, if he could rewrite the petition with the benefit of hindsight, he would add a statement reading 'My opinions are my own'. He would not have removed the statement that he was a member of the TDCIA because he did not feel it would be ethical to do so;
- He did not believe that any TDCIA members were aware of the petition at the time it began circulating;
- CM Markus' first paragraph of the Advisory Opinion Request said that there was 'a request for a petition to be signed by 100 persons'. This is automatically generated by the change.org website where the petition is hosted, and not by Mr. Oh himself;
- The Birmingham Master Plan - 2007 version states that up to two bonus stories would be allowed, except for where adjacent to single family in the area along Hazel and Bowers, whereas the draft 2040 Master Plan allows five stories in the same area. This represents a change in the density;
- A massing diagram included in his documentation demonstrated a nine-story building being permitted, when only a six-story building should be permitted per the Triangle Overlay diagram;
- The current zoning for Elm in the Triangle District allows two-story residential. The draft 2040 Master Plan proposes three-story residential zoning for the same area. This means that the City's contention that the present zoning and the zoning proposed in the draft 2040 Master Plan are identical is inaccurate;
- The resolution which established the TDCIA set the minimum number of residents on the TDCIA to one, but did not set a maximum number of residents;
- He believed he counted as a 'person having an ownership or business interest in property located in the Development Area';
- If he did not count as a 'person having an ownership or business interest in property located in the Development Area' the votes that were taken during his tenure on the TDCIA may have been invalid. But, if Mr. Oh does count as 'person having an ownership or business interest in property located in the Development Area', then Dr. Falucca should have also been permitted to join the TDCIA; and,
- The resolution which established the TDCIA does not prevent residents from having a majority on the TDCIA.

The Chair advised Mr. Oh that the makeup of the TDCIA and the votes taken by the TDCIA were not part of the Board of Ethics' purview. The Chair stated that this meeting was convened to provide advice to Mr. Oh on comporting with the Ethics Ordinance.

In reply to further Board inquiry, Mr. Oh said:

- He did not inform the TDCIA that their votes may have been invalid based on the constitution of the TDCIA at the time because that finding would depend on whether the City correctly interpreted the resolution that established the TDCIA or whether Mr. Oh did;
- He would inform the TDCIA that previous votes may have been invalid if that was the Ethics Board's advice to him;
- He did not know what 'personal gain' the City Manager was contending that Mr. Oh was using his office for;
- He had only read the Ethics Ordinance in preparation for this meeting;
- His signature is contained in attachment three of the Advisory Opinion Request, showing the Affidavit and Disclosure Statement which affirmed that Mr. Oh had read and understood the Ethics Ordinance in December 2020;
- Given his signature, he may have read the Ethics Ordinance before signing the Affidavit and Disclosure Statement but he does not remember doing so;

- He endeavored to understand the Ethics Ordinance to the best of his ability before signing the Affidavit and Disclosure Statement and presently;
- He did not know whether identifying himself as a City official on the petition was germane to his role as a City official;
- His wife recommended that he use change.org to circulate the petition, he did not provide an address on the petition, he did not provide a disclaimer on the petition that he referenced himself as a City official but he was not circulating the petition in that capacity, he did not specifically state that he was a resident of the Triangle District, and the petition was only circulated to residents of a specific Triangle District social media group;
- The petition may have been seen by people outside the specific Triangle District social media group if any one of those residents share it with other people;
- He acknowledged that he had a dispute with City Staff over the accuracy of certain information;
- He posted the petition, and then the City published the FAQ about the Triangle District, which is attachment eight of the Advisory Opinion Request;
- After the FAQ was published, Mr. Oh appeared before the City Commission on April 18, 2022 to explain, in his view, how the FAQ was incorrect;
- He was on the City Commission agenda, and he believed the City Commission knew he was a member of the TDCIA, but he did not know for sure because he did not prepare or review the information provided in the agenda about the topic;
- If Staff could demonstrate his erroneous information, he would be willing to acknowledge that he was mistaken. This has not occurred. His assertions are not a matter of being resolute or stubborn, but the fact that Staff has not cited their sources for believing his interpretation to be incorrect. Rather, Staff has merely asserted he is incorrect;
- He would like Staff to show the texts they are relying on to say that Mr. Oh's interpretation is erroneous; and,
- He has endeavored to do the same to demonstrate his belief that their interpretation is erroneous.

The Chair then reviewed an email exchange that was provided to the Board. The email exchange began on April 18, 2022 at 2:06 p.m. from PD Dupuis to Mr. Oh.

The Chair said the emails from PD Dupuis seemed to be a fairly clear explanation of the facts.

In reply to questions from the Chair, Mr. Oh said:

- He regretted writing in one of the emails 'Can you not read?' to PD Dupuis;
- PD Dupuis' emails represented an inaccurate response because PD Dupuis did not demonstrate that the legend on both referenced maps said the same thing;
- In regards to writing 'It's obvious you did not see the attachment I sent. Please take more care to listen and observe the attached document with references to the pages of the original documents,' he regretted phrasing his request in that way;
- He apologized, and explained he was very frustrated and that 'there was a lot of animosity that goes both ways' that could be reduced;
- He reiterated that he did not agree with the content of PD Dupuis' email; and,
- He did not experience animosity from PD Dupuis in the context of these emails but in other interactions.

The Chair invited Mr. Oh to ask questions of the other witnesses.

Mr. Oh asked PD Dupuis to prove that the legends on both maps contain the same information.

PD Dupuis reviewed the legend for the height plan from the TDUDP and the legend from the Triangle Overlay. He explained this was an area master plan that was transitioned into ordinance language. He explained that they reflect the same information, not that the legends are identically-phrased.

Mr. Oh asserted that the footnote contained in the TDUDP was not adequately represented in the Triangle Overlay legend.

CA Kucharek paused the proceedings to say Mr. Oh's personal criticisms of Staff were improper.

The Chair asked PD Dupuis to respond to Mr. Oh's statement about the TDUDP footnote.

PD Dupuis said that in the ordinance - Section 3.07(E) - Additional Building Height - language was included that reflected the aforementioned footnote from the TDUDP.

Mr. Oh reiterated that the legends of the maps did not contain identical information, since the ordinance map did not specify the footnote from the TDUDP. He said the massing diagram was also inaccurate in that it shows nine-buildings next to residentially-zoned areas. He said PD Dupuis should scale down the Triangle Overlay massing diagram to more accurately reflect what would be permitted.

Mr. Oh and CM Markus reaffirmed their differing recollections of whether they had ever interacted personally prior to the present meeting, with Mr. Oh saying they had not and CM Markus saying they had.

Mr. Oh and PD Dupuis reaffirmed their differing recollections of whether they had ever interacted over the phone or face-to-face regarding Mr. Oh's Triangle-District-related concerns, with Mr. Oh saying they had not and PD Dupuis saying they had.

Mr. Oh said there were misinterpretations of what truly occurred.

In reply to a question from Mr. Oh, PD Dupuis confirmed his statement that the legends of the aforementioned maps, in content but not in verbiage, say the same thing.

Mr. Oh reiterated his disagreement.

The Chair asked whether CM Markus had anything to add.

CM Markus indicated that he did not.

The Chair asked whether there was any objection to closing the record. There was no objection.

**MOTION:** Motion by Chair Robb:  
To close the record.

VOICE VOTE:           Ayes,                   Chair Robb  
  Mr. Schrot  
  Ms. Fierro-Share



Nays,                      None

The Chair then explained that no Board members had communicated about this matter prior to the present meeting, that the Board would discuss the matter and generate a rough draft of their opinion, and that one Board member would then compose the official opinion and the Board would read the opinion and sign it officially. He informed Mr. Oh that he would be invited to attend the meeting during which the opinion will be read and signed.

The Chair noted that this is not a complaint, but a request for an advisory opinion. He stated that the advisory opinion would be determined based on the record, which includes the Advisory Opinion Request 2022-01 and attached exhibits, Mr. Oh's submitted documentation, and the emails between PD Dupuis and Mr. Oh.

The Chair continued that:

- A number of provisions of the Ethics Ordinance might apply in this matter, including using public employment or office for private gain, losing independence or impartiality of action, making a City decision outside of channels, and/or adversely affecting the confidence of the public or the integrity of the City government;
- The Ethics Ordinance provision most concerning to him in this matter is Section 2-324(2);
- It was important to note that Mr. Oh's statement that if he had the opportunity to approach aspects of this issue again differently, he would;
- Advisory Opinion 2009-02, found that Mr. Wisz in that matter overemphasized his membership on a City board and that action could create the appearance that Mr. Wisz was speaking on behalf of City. While everyone retains their rights to free speech, by becoming a City official one must maintain some self-imposed limitations on those rights. Public officials are obligated to be aware that their words could be misinterpreted or misread;
- In this matter, that caution applies to Mr. Oh's representation on the petition of his being a board member of the TDCIA;
- In a 2020 advisory opinion, the Board found that if a Commissioner chose to identify himself as a Commissioner in his communications, that he must avoid giving the impression that his personal opinions are those of the City. Said Commissioner was advised to include a disclaimer to the effect that the opinions expressed are his personal opinions, and not the same opinions of the City or the City Commission, of which he is a member, or any other City official';
- He recommended that Advisory Opinion 2022-01 take into consideration those two matters if his colleagues agree that those matters are relevant;
- There seems to be a lot of misunderstanding in this matter. If he were writing this opinion alone, he would emphasize the need to set aside frustration and the importance of City officials working together on things;
- Being short in one's communication does not accomplish the goal of improving the City's services to its citizens and improving the work of the City;
- City officials are obligated to do their best to ensure that statements they are making are, in fact, true; and,
- Maybe Mr. Oh was mistaken about some of the statements he provided in the petition, and maybe he or the City misunderstood other aspects, but as a City official Mr. Oh was obligated to try and avoid creating mistrust in City government.

Mr. Schrot stated:

- Without saying whether the City Manager was right or wrong, he still commended CM Markus for raising this issue via an advisory opinion request. CM Markus was clearly attempting to act in both the City's and Mr. Oh's best interest;
- Sections 2-320, 2-320(3), 2-321, 2-323(1), 2-323(5), 2-324(a)(2), 2-324(a)(8) are likely applicable in this matter;
- Private gain is defined in Section 2-322 as 'any interest or benefit, in any form, received by a city employee or official';
- Complaint 2020-01 and Advisory Opinion 2009-02 are also likely relevant to this matter;
- Advisory Opinion 2009-02 advised that a City official should only identify as such during advocacy if the advocacy is germane to the City official's role and if the City official states that it is their own personal opinion and not that of a board member;
- In the present matter, Mr. Oh's identification of himself as a TDCIA member at the beginning of the petition would, at a minimum, have created confusion for the recipients of the petition, which raises some concern;
- There is also the question of whether Mr. Oh disclaimed his identification of himself as a TDCIA member sufficiently in the petition text;
- In this case, Mr. Oh's identification of himself as a TDCIA member was even more prominent than in the instances cited in Complaint 2020-01 and Advisory Opinion 2009-02;
- Advisory Opinion 2009-02 did not recommend that City officials preclude themselves from free discussion. It, instead, recommends that City officials be cognizant of the fact that they 'wear two hats' in terms of being both private citizens and public officials;
- The evidence seems to suggest that Mr. Oh shared erroneous information, despite Mr. Oh's contention that he did not. Consequently, it must be considered whether that action may have impaired or decreased the public trust;
- It concerned him when Mr. Oh referred to the City as 'the other side', given that City officials and City Staff are all supposed to be working towards a common interest; and,
- In this particular matter, it seemed that Mr. Oh's advocacy had a relationship to personal gain.

Ms. Fierro-Share stated:

- Mr. Oh started the petition without the consultation of TDCIA, on which he sits. It may have been appropriate to raise his concerns with the TDCIA to discuss what the board's priorities were and what should occur;
- Mr. Oh did adversely affect the confidence of the public and the integrity of City government because Mr. Oh demonstrated a disrespectful attitude towards the City and its Staff; and,
- The Chair and Mr. Schrot covered the Ethics Ordinance aspects of this matter sufficiently.

In reply to the Chair, Mr. Schrot noted that in this matter and Advisory Opinion Request 2022-02 there was no question of a violation of the Ethics Ordinance, since both were requests for advisory opinions, not complaints.

Using Advisory Opinion 2009-02 as precedent, the Chair said the Board could conclude that Mr. Oh did not sufficiently differentiate his personal opinion from an official City opinion and therefore did not conform to the Ethics Ordinance.

The Chair credited Mr. Oh for acknowledging that if he could have re-written the petition with the benefit of hindsight, he would have more clearly disclaimed that his opinion was his own. The

Chair also noted that Mr. Oh apologized for some of the language he used in his email exchange with PD Dupuis.

The Chair said Section 2-323 notes that 'city officials and employees [should] avoid any action, whether or not specifically prohibited by section 2-324, which might result in, or create the appearance of: [...] (5) Affecting adversely the confidence of the public or the integrity of the city government.' He explained that Mr. Oh's conduct in this matter also did not conform with this aspect of the Ethics Ordinance.

The Chair stated that this is guidance for all present and future City officials, not just for Mr. Oh.

In reply to Mr. Schrot, the Chair opined that while the petition did not occur in the course of Mr. Oh carrying out official conduct, the communications and the discourse did and said those facts should be included in the Advisory Opinion. The Chair noted that this was similar to the 2009-02 Advisory Opinion where Mr. Wisz cited his board membership while engaging in private conduct that was not germane to his role as a City official.

Mr. Schrot concurred. He added that:

- Mr. Oh's sharing of erroneous information in this case might be more significant than Mr. Oh's use of his title in the petition text;
- Mr. Oh's testimony regarding his use of his title was intended to assist the public, rather than to confuse the public;
- While Mr. Oh's use of his title in the petition text may have been innocent, it was expressly contrary to the Ethics Ordinance;
- One of the issues that arose in this matter was a lack of familiarity, on the part of Mr. Oh, with the Ethics Ordinance;
- Staff apparently attempted to address this matter in a number of ways, and finally had to file a request for an advisory opinion from this Board;
- Since the Ethics Ordinance intends to be preventative rather than punitive, Staff was attempting to benefit Mr. Oh by filing this advisory opinion request; and,
- The City is required by the Ethics Ordinance to provide this kind of guidance, as noted in Section 2-320.

**MOTION:** Motion by Chair Robb, Seconded by Ms. Fierro-Share:  
To have Mr. Schrot draft Advisory Opinion 2022-01 for consideration of the Board along the lines the Board discussed in the present meeting.

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

<b>VI. PUBLIC COMMENT</b> None.
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<b>VII. ADJOURN</b>
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**MOTION:** Motion by Ms. Fierro-Share, seconded by Mr. Schrot:  
To adjourn the meeting at 4:33 p.m.

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

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Alexandria Bingham, City Clerk



Laura Eichenhorn, City Transcriptionist

DRAFT

**CITY OF BIRMINGHAM**  
**BOARD OF ETHICS**  
**DRAFT ADVISORY OPINION 2022-01**  
**SEPTEMBER \_\_\_\_\_, 2022**

**I. Introduction.**

Birmingham City Manager, Thomas M. Markus, filed a Request for Advisory Opinion (“Request”) with the City of Birmingham Board of Ethics<sup>1</sup> on April 25, 2022 seeking a determination as to whether the recent conduct of a City Official conformed to the Code of Ethics. The subject party referred to by the City Manager is Samuel Oh, who is a member of the Corridor Improvement Authority Triangle District Development Board, a board of the City of Birmingham (“City”). On August 16, 2022, after both requesting party and the subject party respectively requested adjournments of the hearing, the Board of Ethics convened to address the issue on August 16, 2022.

The City Manager’s Request in this matter does not relate to any complaint having been filed against Mr. Oh. Accordingly, the Board of Ethics is not presently considering any allegations that the conduct of Mr. Oh is in breach of the Code of Ethics.<sup>2</sup> The Code of Ethics is intended to be preventative, not punitive.

**II. Issues Presented and Abbreviated Answers**

As set forth in Chapter 2 of the Board of Ethics Procedural Rules pertaining to the procedure for obtaining advisory opinions the ultimate question to be determined by this Board in such instances is: “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?” In the matter at hand, there was and is no dispute that the subject party, Mr. Oh, was and is a “City Official,” and under the City Manager’s authority. The Board of Ethics has determined that certain of Mr. Oh’s conduct has not conformed to the Code of Ethics.

Throughout the hearing, upon the request for an advisory opinion, it became evident that there were two subsidiary questions that needed discussion, analysis and determination. The first of those questions was: “Does the Code of Ethics prohibit a City Official, such as Mr. Oh of the Triangle District Corridor Improvement Authority (TDCIA), from using his position on a City Board, or title associated therewith, to advocate a personal position unrelated to that Board?” The Board of Ethics answers this question in the affirmative. However, one’s use of official position is dependent upon whether the advocacy of the one holding himself out as a City Official is germane

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<sup>1</sup> The Board of Ethics was created by the Birmingham City Commission as an advisory body to interpret the Code of Ethics set forth in a City Ordinance. Birmingham Code of Ordinances §2-325(a)(1). The Board arrives at its opinions and/or decisions upon a vote of the majority of its members after consideration of the evidence in the record and controlling law. Board of Ethics Procedural Rule 216. The Board then sends its advisory opinion to the City Clerk, who will publish and distribute it in conformity with the Ordinance. Board of Ethics Procedural Rule 217.

<sup>2</sup> The Board of Ethics only addresses the specific questions presented to it.

to his or her role as such an Official. Such conduct is only permissible if it is germane to his role as a City Official and if it is abundantly clear that it is his or her personal opinion and not that of the Board (e.g. TDCIA) or the City.

The second question is: "Whether Mr. Oh's dissemination of inaccurate information pertaining to the City, after being advised by City staff as to the accurate facts, was intentional, self-serving, and detrimental to the public's trust in City government?" The Board of Ethics also answers this question affirmatively.

### **III. Statement of Facts**

On March 25, 2022, the City Manager learned that City Official Oh, a member of the TDCIA, hosted on the social media site Change.org a request for a petition to be signed by 100 persons for revision of the Triangle District Master Plan. The City Manager attached to his Request a copy of the petition. Mr. Oh initiates his petition, upon a website he (and/or his wife as he stated) selected, with the words "Samuel Oh started this petition." Mr. Oh thereafter begins the petition with the entire first paragraph reading "My name is Samuel Oh and I am a member of the Corridor Improvement Authority (Triangle District Development) board." Mr. Oh is a member of the board, as in part shown by the City Manager of Mr. Oh's Application for City Board, Mr. Oh's Affidavit and Disclosure Statement to the City dated on or about December 21, 2020, (whereupon he subscribed and swore on that date immediately above his signature to the following quoted language: "I have read and 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."), his Affirmation of Support of the City's Charter and Code of Ordinances (relating to his affirmation that he would support the City's Code of Ordinances in performing the duties of office), and Mr. Oh's attestation before the City Clerk on December 21, 2020 that he would support the U.S. and Michigan Constitutions and endeavor to secure and maintain honest and efficient administration of the affairs of Birmingham, free from partisan distinction or control, and to perform the duties of the office of the Birmingham TDCIA according to the best of his ability.

In the City Manager's Request, he asserts that the Code of Ethics is clear that one is not to use public office for personal gain, and that acting on behalf of the City one does so with the utmost integrity and without even the appearance of impropriety. He expressed his concern with Mr. Oh in using his position as a Board Member to circulate a petition for revision of the Birmingham Triangle Development Master Plan. In addition, the City Manager asserted that Mr. Oh's statements at Change.org were fraught with inaccuracies and therefore a concern to the City, and therefore contrary to certain provisions of the Code of Ethics.

The City Manager was also concerned as to Mr. Oh's content, and/or use of, this social media, and the use of the petition as aforesaid, to sound as though he was acting in an official capacity and performing an official action of the Board. The City Manager noted Mr. Oh's use of his official position with the City in the petition and was concerned that perhaps Mr. Oh, in order to secure and request signatures on his petition, was using his official capacity to advance his personal position and attempt to benefit his own property value(s).

The City Manager also questioned whether Mr. Oh was acting in a way that was not in compliance with his duty to his City board, but instead was utilizing his position to act against the Triangle District Board's Plan, for which Mr. Oh has been sworn to represent and make decisions on behalf of the board.

The City Manager further expressed concerns regarding Mr. Oh's actions at a Planning Board meeting, which was held on March 9, 2022. The City Manager stated that Mr. Oh made comments regarding the process and makeup of the Birmingham TDCIA (of which he is a member) along with potential impacts of rezoning on the neighborhood. The City Manager provided this Board with the Planning Board Minutes of March 9, 2022. The City Manager stated that Mr. Oh made therein multiple erroneous statements of the Board's makeup. The City Manager also attached the City Clerk's Memo to the Manager on March 15, 2022 detailing the correct information regarding the Board and a transcript of Mr. Oh's false or inaccurate statement. This Board of Ethics was also provided by the City Manager with the City Manager's Report offered to the City Commission on March 28, 2022, wherein the Manager stated that he had to "set the record straight" for the City Commission regarding Mr. Oh's misstatements.

In this regard, the City Manager was concerned about Mr. Oh disseminating misinformation to the world, while at the same time the Code of Ethics required Mr. Oh to avoid any action which would effect adversely the confidence of the public or the integrity of the City government.

The City Manager at the hearing before this Board of Ethics presented his position and evidence, further stating in part that he sought an Advisory Opinion. He noted that Mr. Oh is "a fairly new board member, and that while applicants have to sign they have read the City's Code of Ethics, they don't always understand it." He further noted that his opinion came about after "some consternation between Mr. Oh and some City staff. He did not feel he (Mr. Oh) was getting answers he felt he wanted." The Manager asserted that Mr. Oh was informed by City Staff that he was sharing incorrect information, but that Mr. Oh did not change the information he was sharing after receiving the correct information from Staff. The Manager further stated that Staff had conversations with Mr. Oh prior to Mr. Oh's circulating the petition. These conversations sought to clarify Mr. Oh's factual misunderstandings about the TDCIA and the Triangle Plan. Mr. Oh indicated to Staff prior to his circulating his petition that he had a clearer understanding of the concerns relating to the differences of opinions.

The City Manager further stated in part that "The Triangle Plan hasn't changed in the 2040 Master Plan. That was what we were trying to convey as inaccurate." The City Manager additionally stated "The Master Plan is a global process. The Triangle Plan is a zoning plan. It was merely a repetition in the 2040 Master Plan. There is a Triangle Plan that was adopted in 2008. That's when development standards were adopted. There has never been a Triangle District Redevelopment Plan, as noted in the petition."

Testimony was also provided in support of the Request by the City's Planning Director, Nicholas DuPuis, as well as Assistant City Manager, Jana Ecker.

Mr. DuPuis testified in part that he and Mr. Oh engaged in an email exchange whereby Mr. DuPuis attempted to clarify the intent of the 2040 Master Plan in relation to the Triangle District. He stated that when he attempted to clarify the specific misreading made by Mr. Oh of some images contained in the draft 2040 Master Plan, the email exchange became inappropriate and City Manager Markus was notified of the issue. Further, in mid-April 2022, City Staff attempted to address previous misunderstandings about the Triangle Plan at the Joint Commission-Planning Board Meeting.

Assistant City Manager Ecker testified in part that a redevelopment study between 2013-2015 was not about redevelopment, but only about how much parking was needed using TIF

money. She stated in part: “It didn’t change height standards or ordinances.... saying increases in height and zoning – that is not true. That is already allowed since 2007. He’s (Mr. Oh) putting his name as a Board member to give it weight, and all of the information he’s putting out is false. He continued to put it out there after being told multiple times it was false.”

Mr. Oh challenged the City Manager, Planning Director and Assistant City Manager, repeatedly stating that the City had an “overreach of their interpretation of official documents,”. He further testified that he began the Change.org petition stating “My name is Samuel Oh and I am a member of the Corridor Improvement Authority (Triangle District Development) board,” as an effort toward full disclosure and that the City had changed their Triangle District Master Plan in the 2040 Master Plan process. He did so despite repeated clarifications from City Staff that it had actually been approved in 2007 and was only reproduced in the 2040 Master Plan process. He testified that he has been a resident of the Triangle District since 2013, and does not own a business in the District.

Mr. Oh also testified in part that he had to listen to “these inaccuracies that I am accused of...what is intent, and what was I representing.” He stated in relation to putting his name on the petition that he “was just giving it the perspective of a resident”, and that “if I didn’t disclose it would build up distrust.”

Mr. Oh further testified that even if he had known it was a violation of the Code of Ethics, he still would have used his official title in the petition “because it’s unethical not to.” Upon further inquiry, Mr. Oh when asked if he was concerned about the purported Master Plan as to why he didn’t bring this up with his own board. He stated it was because he believed his interpretation was correct. It would have been advisable for him to raise his concerns with the TDCIA, to discuss what the board’s priorities were and what should occur.

During the discussion, Board of Ethics member Sophie Fierro-Share voiced with everyone her insight as follows: “Errors are made. Making a mistake isn’t unethical. Where it’s an issue happens when we’re not open to understanding.”

Board of Ethics member James Robb pointed out that there have been other situations when officials have been frustrated with other public officials, but they have to get along. Words matter. “As a public official, you have an obligation to make sure that statements of fact are in fact, facts. People see you as an official and maybe you are mistaken on some things you put in your petition, but that can cause mistrust of City Officials by the public.” At one point during the hearing, Mr. Oh referred to the City as “the other side.” However, he did state at the hearing that he did not intend to represent his opinions as those of the TDCIA or the City. He stated he wrote the petition on behalf of some fellow Triangle District residents after discussion with them, but did not mention that the petition was written on their behalf as he was trying to keep the text of the petition brief.

Mr. Oh submitted three additional documents into evidence at the hearing. The first was a City of Birmingham Resolution Establishing Corridor Improvement Authority and Designation of Development Area dated November 10, 2008. The second is dated March 9, 2022, and was described by Mr. Oh as part of a package he gave to the City Commission. The third was various emails relating to communications between Mr. Oh and Messrs. Markus and DuPuis. This Board found that these documents were supportive of the testimony of City Staff Markus, DuPuis, and Ecker.



Toward the end of the hearing, Mr. Oh expressed some remorse for his aforesaid conduct and some of the language he used in his email exchange with Mr. DuPuis. The City Manager did not file, and has not filed, an Ethics Complaint against Mr. Oh on the issue of whether his conduct violated the Code of Ethics. The City Manager's request for guidance on how he and/or Mr. Oh should conduct themselves in adherence to the Code of Ethics and/or in municipal governance is a legitimate and appropriate attempt to address the matter.

#### **IV. Analysis and Discussion**

This is not a matter involving an issue concerning conflict that Mr. Oh had with the work that he does in association with the TDCIA. Mr. Oh is a member of said board, and therefore his statement as to his status as a City Official is not false. This Board of Ethics has previously determined that a Board member may hold himself or herself out as a member of a City Board under certain circumstances.<sup>3</sup>

The Studt Ethics Opinion stated that "(t)he Ethics Ordinance clearly prohibits all City employees (or officials) from using public office for private gain." Section 2-320 and 2-323(1). It further pointed out that the Code of Ethics defines "private gain" as "any interest or benefit, in any form, received by a City...official." See Section 2-322. The Studt decision recognized that "a benefit need not be monetary to fall within the terms of the Ethics Ordinance." That opinion further cited Section 2-324(a)(8) of the Ordinance, which provides 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 himself, herself, or others, beyond that which is available to every other citizen." In Mr. Oh's matter, his advocacy had a relationship with person gain.

The Wisz Ethics Opinion<sup>4</sup> determined that the use of his official position in that case was not germane to the matter being pursued by the City Official. This Board has found the same in the instant case involving Mr. Oh. As stated in the Wisz Opinion, "(t)he ethical difficulty and concern relates to a situation where a private citizen opts to also become a 'City Official' and therefore 'wears two hats.' Someone in such position has to be careful about creating a false impression, such as that one is speaking on behalf of the City itself." The Ethics complaint opinion relative to Mr. Ralph L. Seger, Jr., being number 2004-02 also has some relevance herein. This Board therein made it clear that it is mandated to recognizing and adhering to the principles of the First Amendment.<sup>5</sup> However, the First Amendment principles do not permit a member of a City Board to assume a role, and act as a competing fiduciary, directly against the interests of the City. As stated in Wisz, "(s)uch conduct presents an irreconcilable conflict of interest, may tend to undermine respect for City Officials and employees and for the City as an institution, might result and/or create an appearance of adversely affecting the confidence of the public or the integrity of the City government, and is incompatible and in conflict with the discharge of the volunteer's official duties." Herein, Mr. Oh's identification of himself as a TDCIA member at the beginning of

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<sup>3</sup> See Ethics Opinion 2003-04, decided February 3, 2004, pertaining to then Deputy Chief of Police Donald Studt.

<sup>4</sup> See Ethics Opinion 2009-02, decided May 4, 2010, pertaining to David Wisz of the Traffic and Safety Board.

<sup>5</sup> As an adjudicative body, the Board of Ethics is compelled to consider controlling legal principles. Section 2-323 of the Code of Ethics provides that the Ordinance "should not be construed to interfere with, or abrogate, in any way the provisions of any federal or statute statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement."

the petition appears to create confusion for the recipients thereof.<sup>6</sup> His representation that the use of his official title was intended to assist the public is illogical. Public officials are obligated to be aware that their words could be misinterpreted or misread. Therefore, it is advisable to include a disclaimer to the effect that the opinions expressed are his personal opinions, and not the opinion(s) of the City or any other City Official.

The foregoing was and is never intended to preclude a City Official from expressing his or her opinions on matters that come before his or her respective board. As stated in part in the matter involving Mr. Terence Gates (Advisory Opinion 2007-02), "Birmingham's municipal government depends upon knowledgeable citizens of diverse backgrounds volunteering for service on City Boards. The Ordinance encourages them to act independently. Ethics Ordinance Section 2-323(III). It is perfectly proper for Mr. Gates to express his opinions on matters that come before the Parks and Recreation Board, at the Board or even, as he did, to the City Commission. Nothing in the Ethics Ordinance says otherwise...If City officials cannot express opinion, debate the merits of those opinions and vote their consciences, the quality of our City's democracy would be significantly impaired."

We will now turn our attention to the specific sections of the Code of Ethics either cited by the City Manager in his Request and/or discussion by members of this Board at the hearing of this matter. This Board finds that Mr. Oh's conduct in this matter did not conform with the following sections of the Ethics Ordinance.

**Section 2-320.** The Code of Ethics begins with Section 2-320, entitled "Public Policy." This section discusses public trust as well as that one may not use a public office for personal gain, as the City Manager has argued herein. The following paragraph, from the Wisz opinion, has application herein, and it provides:

"The Ethics Ordinance provides that public office is a public trust. Birmingham Code of Ordinances, §2-320. The Code of Ethics is intended to provide public officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants. Id. §2-320. The Ethics Ordinance requires City Officials, as defined in §2-322, to avoid conflicts between their private interest and the public interest. City Officials are fiduciaries, and their positions are held in public trust. City Officials must not use their public office for personal gain. Id. §2-320(3). In Mr. Wisz's subject signature block, the emphasis was on the Birmingham Traffic and Safety Board over any other item listed in the signature block. Such over-emphasis could create the appearance of Mr. Wisz speaking on behalf of the City."

The same is true as to Mr. Oh in this case, especially as "private gain" is broadly defined in Section 2-322, to mean "any interest or benefit, in any form, received by the City employee or official." Both Mr. Oh's use of his official position in his petition, as well as his dissemination of information that he was advised by City Staff in advance was incorrect, create the appearance of an action and type to be for personal gain, and with the risk of adversely affecting the public trust.

**Section 2-321.** While this section of the Code pertains to the responsibilities of public office, and primarily discusses official acts and conduct (as opposed to private acts and conduct), this Board

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<sup>6</sup> Mr. Oh's identification of himself as a TDCIA member was even more prominent than in the instances cited in Complaint 2020-01 and Advisory Opinion 2009-02.

has previously opined that this section mandates that all City Officials protect public confidence by being honest, fair and respectful. Mr. Oh adversely affected the confidence of the public and the integrity of City government, as he also demonstrated a disrespectful attitude towards the City and its Staff. Mr. Oh did not exhibit respect in his actions with City staff either prior to or during the subject hearing. This Board understands that Mr. Oh during the hearing did offer an apology of some nature. His gesture suggests to this Board that the time and effort put in by City Staff, as well as this Board, to address this matter may be beneficial to all concerned in the future. City Officials are obligated to do their best to ensure that statements they are making are true.

**Section 2-323.** The City Manager has cited subsections 1, 3, 4 and 5 as potential violations (i.e. non-compliance). This Board concludes that subsections 1 and 5 have application. Section 2-323 pertains to the intention of the Code. It points out in pertinent part that City Officials should avoid any action, whether or not specifically prohibited by Section 2-324 (Promulgation/Conflict of Interest) which might result in, or create the appearance of, in this case:

- (1) using public office for private gain; and
- (5) affecting adversely the confidence of the public or the integrity of the city government.

This section also describes that the Code of Ethics is not intended to be punitive but rather preventative. Accordingly, the Code should not be interpreted to in any way interfere with, or abrogate, any statute, ordinance, City Charter, and/or rights or remedies.

**Section 2-324.** The City Manager indicated his concern with a potential violation (i.e. non-compliance) of Section 2-324(a)(2) and (9). This Board has determined that subsections (2) and (8) have application. Subsection (2) provides as follows: “No official or employee of the city shall represent his or her personal opinion as that of the city.” Subsection (8) reads: “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.”

## **V. Conclusion**

This Board concludes that for the reasons stated above, Mr. Oh’s complained of conduct did not conform to the Code of Ethics. While we recognize that Mr. Oh has been a City Official for a brief period of time, his subject actions appear to be rooted in his personal interests and/or attitude, and not his inexperience and/or unfamiliarity. His conduct clearly evidences, as well as his own admission, that he has little, if any, familiarity with the Code of Ethics, though he was duty-bound to acquaint himself therewith and attempt to understand same. The Code of Ethics was specifically identified and emphasized as a subject of importance from the start of his official engagement with the City by way of the language of the City’s required Affidavit and Disclosure Statement. This has apparently caused Mr. Oh to make some poor decisions as it relates to the aforesaid two underlying questions relating to his conduct herein. City Staff attempted to address Mr. Oh’s conduct in various ways, and finally had to file the subject request. The City is required by the Ethics Ordinance to provide this type of guidance, as noted in Section 2-320. It appears that through this Ethics Board process Mr. Oh better understands the importance of City Officials working cooperatively together.

While this Board's Advisory Opinion will be published and communicated to the City Commission and the public (pursuant to Section 2-325(b)(2)), it is intended to assist Mr. Oh with respect to his future conduct. In that regard, it may be viewed as preventative, and the City is providing Mr. Oh herewith additional adequate guidelines for separating his roles as a private citizen from his role as a public servant. Nevertheless, pursuant to Code of Ethics Section 2-325(b)(3) after this Opinion is published and communicated to the City Commission, it shall be responsible for imposing any sanction.

As a final remark in this Opinion, for the benefit of Mr. Oh and all other City Officials, we wish to emphasize an important underlying theme of this Opinion, by reciting the following from the Advisory Opinion 2009-02 pertaining to Mr. Wisz, as follows:

"Accordingly, this Opinion celebrates the rights of free speech, but also addresses the self-imposed limitations thereof when one voluntarily elects to become a City Official. When one serves in the public sector, one becomes less and less a 'public citizen' and more and more a 'public servant.' This is part of the responsibilities and burdens one accepts as a public official. Being a public servant may constrain one's activities in many ways, including the open expression of personal views. Having the right to engage in an activity doesn't mean exercising that right is necessarily the best course of action."

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SOPHIE FIERRO-SHARE

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JAMES D. ROBB, Chairperson

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JOHN J. SCHROT, JR.