

**CITY OF BIRMINGHAM  
BOARD OF ETHICS MINUTES  
DECEMBER 16, 2016 – 3:00 PM  
151 MARTIN, BIRMINGHAM  
CONFERENCE ROOM 202**

**I. CALL TO ORDER**

**MOTION:** Motion by Mr. Robb, seconded by Mr. Schrot:  
To appoint Mr. Schrot as temporary Chairperson of the meeting.

VOTE:           Yeas,    2  
                  Nays,    None  
                  Absent, 1 (Fierro-Share)

Acting Chairperson Schrot called the meeting to order at 3:10 PM.

**II. ROLL CALL**

Present:        Mr. Robb  
                  Mr. Schrot  
Absent:         Ms. Fierro-Share  
Administration:    City Manager Valentine, City Attorney Currier, Acting Clerk Arft

**III. APPROVAL OF MINUTES**

**A. Approval of minutes of February 12, 2016**

**MOTION:** Motion by Robb, seconded by Schrot:  
To approve the minutes of February 12, 2016.

VOTE:           Yeas,    2  
                  Nays,    None  
                  Absent, 1 (Fierro-Share)

**IV. UNFINISHED BUSINESS**

**V. NEW BUSINESS**

**A. City Commission Referred Advisory Opinion Request 2016-03 dated October 27, 2016**

City Manager Valentine explained the City Commission's request and provided background information from City Commission minutes of May 6, May 23 and October 27, 2016. The correspondence from Birmingham Youth Assistance was also provided. He explained that the commission had some reservation in regard to that request given the nature of potential conflicts that could arise from that relationship. The commission had discussion about what exactly was being requested of them as a commissioner or the expectations of them serving in this capacity as a commissioner. In this particular situation, it is the Birmingham Youth Assistance organization that presented the request. The conversation evolved into from any community-based organization that makes a request of the commission to serve in this type of capacity. What concerns should the commission have and how does that relate to any potential conflicts of interest where the requests come from organizations which may request funding from the city or put the commission in a position where they would be advocating on behalf of the

organization as a commissioner in regards to soliciting funds and things of that nature. A discussion included appointment as a voting member, a non-voting member, or a non-participatory information-sharing role, and there were differing views on that. There was discussion that perhaps this should be referred to the Ethics Board for an advisory opinion based on some specific questions. There were variations of those discussions, and the last meeting was October 27<sup>th</sup> at the commission level, and they were presented with three options to consider. The first one was to appoint someone as a voting member, the second one was to appoint as a non-voting member, and the third one was following up on their conversation about the advisory opinion to refer to Ethics board and get an opinion on the conflict of interest language. There was also a variation presented that the commission reviewed and thought it was too specific. Ultimately, direction was given to staff to filter through that conversation, and develop some questions based on the intent of the commission that could be presented to this board for clarification.

City Manager Valentine provided the questions to the members. He suggested that this meeting serve as an informational meeting to understand the background and intent, and review the questions for clarification in determining how to proceed.

Mr. Valentine confirmed for Mr. Robb that currently this applies to the board of Birmingham Youth Assistance and to the board of NEXT. Commissioner Bordman is currently a voting member of the NEXT board, and she has been recusing herself from discussions involving NEXT to try to avoid that conflict. Since there are two, and the commissioners felt there could be more in the future, it would be helpful to get clarification through an advisory opinion on how these board appointments relate to the conflict of interest language in the ethics ordinance and recommendation going forward on how to treat these specific questions with funding requests that go before them and for the benefit of making their determination in the future.

Mr. Robb provided background on his personal involvement on various boards, and discussed his fiduciary responsibilities to his employer as well as to the boards with which he is involved. Although he is not covered under an ethics ordinance in those situations, board members do have a fiduciary obligation to the organization.

Mr. Currier said one of the questions raised was, if being an elected official creates a higher fiduciary obligation than being appointed to a board. In other words, can one serve two masters, and if not, which one controls. Mr. Schrot said there is a distinction between commissioners and board members. In this respect, we are only dealing with commissioners. Mr. Schrot asked, as it relates to service on non-profit boards, is there a companion body of law that should be considered that impacts this issue, or a state ethics code that may relate as well. He thinks the board should have that information in order to address these questions.

Mr. Valentine clarified that the commission's intent was to have staff develop the questions for the board based on the conversations by the commission. He wanted the board to have the background of how this evolved, and what the considerations were to get to this point. He explained there has been quite a bit of conversation by the commissioners and several questions have been raised.

Mr. Schrot noted that the initial question seems to limit it to community-based organizations that rely on city funding, but he does not think it would be limited to those organizations or those issues, because requests could be other than economic.

Mr. Schrot noted it has been the practice of the commission to appoint commissioners to serve on the board of directors of certain community-based non-profit organizations. Mr. Valentine confirmed that is true for only those two organizations. He explained that historically, there has been a request from the boards. He explained that we have four new commissioners. He said Scott Moore had served with NEXT for perhaps a decade or more. Mr. Currier said Tom McDaniel served with Birmingham Youth Assistance for many years as well.

Mr. Schrot said he questions the practice of the appointments. Mr. Valentine said that the commissioners questioned it as well. Mr. Schrot noted that the board is not being asked to address that issue, but in the course of our discussions, the practice may need to be examined, because it may create problems for the individual who is appointed as a commissioner in wearing his or her city hat.

Mr. Valentine said that is why the commission wanted to take a broader approach, and ask whether it creates a conflict for any community-based organization in which the commission is asked to participate.

Mr. Robb asked who is appointing whom to what. Mr. Valentine said the city commission would appoint a commissioner to one of the boards. Mr. Robb said that is different. He explained there is a difference between being appointed personally while a commissioner. For example, if a commissioner chooses not to run for reelection and was the commission's appointee to BYA, does the seat on BYA become vacant upon the expiration of the term of office. Mr. Valentine said that in these cases, the representation came because of their role as a commissioner and being asked as a commissioner to serve in that capacity. Mr. Currier confirmed it is the city seat on the board. Mr. Robb and Mr. Schrot agreed there is a distinction.

Mr. Valentine said former commissioner McDaniel was the representative from the commission on the Birmingham Youth Assistance. When his term ended in November 2015 and new commissioners were elected, BYA asked Andrew Harris. Mr. Valentine was presented with that request, and he explained that it was the city commission's appointment and not the BYA's decision who is appointed.

Mr. Robb asked what is the basis for the decision to be made by the commission and not the community group. Mr. Valentine said if a commissioner is going to serve in his or her capacity as a commissioner, he or she must be appointed. These positions are all done at the approval of the commission. If someone is appointed to the MML or SEMCOG for example, that is done at the appointment of the commission. It is an official role, because the organization is asking for an official city commissioner to be in that role.

Mr. Robb said he is not sure the commissioner is in a conflict. He said there may be a political or broader question whether the city as the governmental entity, ought to have anyone who is some sort of official role in some other entity that transacts with the city.

Mr. Currier suggested we think of this as a city seat and the commission appoints someone to sit as a representative of the city. Traditionally, the commissioner would not participate in discussion of requests for funding at the board level, nor would they vote on it at the commission level. The question was asked is that a breach of fiduciary duty to the city being an elected official, and maybe a liaison and not a voting member at all is the correct approach.

Mr. Robb said the community organization has its own bylaws and those bylaws say who will be on the board, and the characteristics of that board member. He said maybe there is something in their bylaws that says there shall be one seat reserved for a city commissioner. Mr. Currier said historically that is the way it has happened, but this came into question for the first time other than simply disclose and recuse. The question became, is it even appropriate to be on the board and be a voting member.

Mr. Schrot said the appearance of impropriety is the problem, and in those discussions should there be a city seat, there probably should be discussion about the fact that that may result in the person being appointed having to recuse himself or herself from decision making and/or discussions on city matters that may relate to that non-profit because of public perception. And that would be whether or not it was a voting or non-voting position. That may include even the position of being a liaison, because if you are appointed by colleagues on the commission to be a liaison, that insulates one from the public perception a bit, but not entirely so. He continued that he thinks a commissioner has to be aware of that if they are even being considered for a position of appointment to a non-profit board. He was unaware of this practice, and in the course of the discussions, we need to consider whether or not that is appropriate. Other organizations may ask for a commissioner to serve on the board, now the city is arguably showing favoritism in providing manpower to certain non-profits and not others. As a general rule, it is better to be a non-decision making participant on the non-profit, because the commissioner is already charged with the duty of public service to the City of Birmingham, even before one begins engaging for a non-profit organization. That creates issues when one is already a member of a non-profit board, and then gets elected. It is a complex question.

Mr. Robb agreed, and said the city is arguably showing favoritism to certain organizations, but the commissioner is not. The commissioner is appointed by the city to be on the board and not for personal benefit. It may be a political question for the city. The commissioner is doing it for benefit of the city almost by definition because he or she has been appointed by the city to sit on that seat.

Mr. Valentine said then the question is the appointment, and is that appropriate in the context with the ethics ordinance. Mr. Robb said the ordinance talks about a person, not about the action of the city commission. The city commission can amend or repeal the ordinance at any time. The only thing that trumps is the city charter. If it is a question whether the city can do this, we have to look at the charter, or some statute.

Mr. Schrot agreed, but added his concern is the commission making the decision to fill the certain select non-profits. If a commission were to vote to appoint to a particular non-profit, is that violation of the ethics ordinance in any way. There would have to be some discussion as to why there is going to be an appointment to this non-profit vs. another. That is putting a commission in a difficult position because if he or she votes to appoint a commissioner to BYA, they have to justify that decision when another non-

profit comes along, and the commission refuses to appoint. Mr. Robb asked to whom they would justify it. Mr. Schrot said to the public in the election. Commissioners can act in a certain way, and whether or not that is approved by the public will be determined as to whether or not the commissioner is reelected or is recalled. Mr. Schrot thinks that in the course of our discussions, we have to be cognizant of the fact that the commissioners are aware that is not without risk or restriction that they would serve on a particular non-profit or that they would vote to provide a commissioner to a non-profit.

Mr. Currier said it is a broader question of whether a commissioner can be on any board, regardless of how he or she was appointed, that has dealings with the city, and then look at the details.

Mr. Schrot said we should look at that, and instinctively the answer is yes. To a certain extent, one level is the restriction by law, or otherwise by the ethics ordinance. Assuming not, the other extreme is to let the voters decide whether or not the conduct is appropriate. He said we have measures in the ethics ordinance for disclosure and for recusal. He thinks the commissioners are looking for better guidelines as to what they can and cannot do. Mr. Valentine agreed, and added that it is in relation to conflict of interest.

Mr. Valentine said if it is not prohibited by law, and it does not run afoul of the ethics ordinance to allow it, is there a conflict of interest or perceived conflict of interest as a result of it, and what are the considerations that should be given in that regard.

Mr. Schrot said that if someone were to say that there is no prohibition on serving, then one would get into a case by case basis as to whether or not it is a conflict of interest, and what are the measures for protection. He said the commissioner who may be on a non-profit has to recognize that he or she may be in a situation where they may be restricted as far as their participation in relation to the duties on behalf of the city and how is that going to be dealt with and received, because much of this will come down to judgment.

Mr. Schrot referred to an article from the Institute for Local Government titled "Commitment to Non-profit Causes and Public Service: Some Issues to Ponder", which he thinks is particularly good and will circulate it to everyone. It talks about issues and different scenarios including fundraising among others. We can provide some guidelines in this opinion regardless of what the questions may be. He was not aware of the practice of appointment. On the surface, it is pretty innocent and is benevolent.

Mr. Robb asked if the city commission approves a commissioner by a resolution after a commissioner has expressed some interest. He asked if the resolution stands legally on par with the ordinance. Mr. Currier said an ordinance is a legislative action that establishes law, and is not certain they are on the same par. A law is not changed when a resolution is passed.

Mr. Robb said he does not see conflict as to the particular fact here, realizing there may be a number of facts that are broader. This ordinance does not bar the city commissioner from appointing a commissioner to do city business by serving on a board.

Mr. Valentine said the commission knows that it can appoint. The question is should they, and what considerations should be given when and if it is done because of the conflict of interest.

Mr. Robb said there is no conflict of interest. He said the commissioner is essentially the city's agent. In response to Mr. Currier, Mr. Robb said if a commissioner, not appointed by the commission, is appointed by the organization, that commissioner is not doing city business. By virtue of the commissioner's position on the commission, he or she is important to the organization, and he or she has agreed to it, knowing he has an obligation to the city.

Mr. Valentine clarified that the seat is delineated by who the organization wants on their board. The organization can ask whomever they like to serve, and their idea is to appoint those who will have a positive influence on our organization, including the funding sources. Mr. Robb said the city recognizes that.

Mr. Schrot agrees with Mr. Robb that even though it may not be a city seat, it is a city action in making the appointment. He thinks that if the commissioner accepts the appointment, he or she has to be aware of the ramifications in relation to the ethics ordinance. The commissioner also has to be aware that if there is any business that the organization has before the city, he or she has to make a judgment as to whether or not he or she has to disclose or recuse himself or herself to the organization's board and to the city, so that the public is aware of that relationship.

Mr. Robb said the problem is the organization's problem, not a city's problem. The organization has a board member who has a higher fiduciary duty to the city. The organization has a board member who cannot be independent.

Mr. Schrot said if we take that approach unilaterally, we are exposing that commissioner to some risk which may not necessarily be an ethics violation, but the public may not know the commissioner was appointed to the non-profit by the city. The danger is political.

Mr. Valentine said the commission cannot take action on anything that is going to lock in a future commission, or that would impact anything in the future. In this case, it is a request from BYA for a commissioner to be appointed by the city. Typically, the resolution was to appoint the commissioner to the board. He asked if that is carte blanche for every issue that comes before that board to take a position on behalf of the city, without the city knowing what the issue is. Mr. Robb said it is. Mr. Currier said that is where reliance is on the appointee to come back to the city manager and commission for guidance. Mr. Valentine asked how much authority the commissioner actually has with the appointment. Mr. Robb said that without some restriction on the appointment, the commissioner has to vote because he is a board member. He has an obligation to that organization as well.

Mr. Schrot said the commissioner may have to say, without the distinction of being a voting member or a non-voting member, that he or she is a city commissioner and has some concern about being able to vote. This is risky for the commissioners, and when we deal with issues like appointment, it is risky for the city.

Mr. Schrot said is there a benefit to the city and to the individual commissioners to appoint a commissioner to a non-profit. Mr. Valentine said the organization obviously has a benefit by having a tie directly to a funding source. Mr. Schrot said there is a price to pay by the city by making that appointment, if nothing else it may restrict the appointment commissioner from participating in discussions and/or voting as it relates to the non-profit organization.

Mr. Robb said the appointed commissioner does also have a fiduciary duty to the non-profit board and that is a problem. It is a conflict on the board, not the city.

Mr. Robb said the safe answer is for the city to not appoint anyone to a non-profit board.

Mr. Schrot said it is the prudent action, and the rationale is that it creates a limitation on potential action by one of the city's decision-makers in relation to city business involving that non-profit. Mr. Schrot said the request could not only be financial, but for permitting for example.

Mr. Robb expressed concern about the board's jurisdiction.

Mr. Valentine asked if the influence of being a commissioner has any weight in the discussion requesting funds. He asked how does that play in if a commissioner, in his or her capacity as a board member, is asked for funds to support the organization.

Mr. Robb referred to the Section 2.324(10) of the Ethics ordinance which determines the existence of a conflict of interest, and said this situation does not pose a conflict according this section. He then referred to section 2.324(6) which discusses impairment of his or her independence of judgment or action in the performance of official duties. Mr. Robb sees a distinction between a commissioner being appointed by the city to a board, and a commissioner being appointed as a board member, but not by the commission. Section 2.324(4) discusses the influence factor.

Mr. Schrot said we need to determine whether or not the city intends to go forward with this practice of appointing. If it does, that is an entire discussion in and of itself, which is a major issue. If the city is not going to appoint, and the individual is going to act in his or her individual capacity, that is another question. Ideally, he said we should avoid this, rather than take all the time and effort to address this issue of the city appointing, we may want to draft a letter back asking for clarification as to what the commission's future practice would be.

Mr. Valentine said he envisions that the response would be tell us if it is a conflict or not, and then we can tell you if we are going to continue the practice or not.

Mr. Robb said this calls for a conversation with the commission. He does not see on this specific matter, a violation of the ordinance. He does see a potentially a political problem, a governmental process problem.

Mr. Valentine said this is what they struggled with as well. While some commissioners had interest in moving forward and thought the ordinance covered it with the opportunity to disclose and recuse, others thought that it was not sufficient, and the

commission should not do it. The idea was to ask for an advisory opinion interpreting the ordinance addressing these types of questions.

Mr. Schrot said it may beg the question as to whether or not a legal interpretation of the ordinance from the City Attorney is needed, as to when someone is appointed by the city, is the individual acting on behalf of the city and not as an individual. That would take some pressure and risk off of the commissioner.

Mr. Schrot said his concerns are over what laws may be applicable and may influence these issues. He referred to a section of the ILG article regarding fundraising, which says "using one's official position to, in essence, force donations to non-profits violates state and federal laws that prohibit extortion and protect the public's right to officials' honest services". He continued discussing the disclosure requirement. He does not know if disclosure requirements are a matter of law, and that may be beneficial to know because the law trumps ethics. Ethics is broader and more vague, and is a big net that catches people. Ethics violations can result in financial and/or penal consequences.

Mr. Robb recommends that the board identify any section of the ordinance that is implicated by the commission's questions initially, and then do a retrieval of whatever other literature is available on this topic that will help him and Mr. Schrot to come up with an opinion to give the commission, and see what statutes may apply. Mr. Schrot said the board may be reworking the ultimate issue(s) and not specifically answering the questions.

Mr. Schrot said that when asking the question "does a conflict of interest arise when a city commissioner is appointed by the commission to serve as a board member (voting or non-voting) for community-based organizations", it leads to the question, a conflict of interest by whom. Mr. Valentine said the conflict of interest is for the city commissioner. Mr. Schrot said that based on the discussions today, the answer is no. Mr. Robb agreed.

Mr. Schrot said that when the practice of appointment by the city commission occurs, what problems are being created for the commission by this appointment practice.

Mr. Valentine suggested the board should address the other questions because part of the conflict of interest is the issue of the solicitation of funds or donations arises.

Mr. Schrot agreed, but said that gets into the realm of whether the commissioner is acting at the behest of the city, or on his or her own behalf. Mr. Robb said it is absolutely on behalf of the city.

Mr. Valentine read paragraph 3 of the October 3, 2016 letter to him from Birmingham Youth Assistance which discusses the organization's fundraising activities and their expected level of involvement of the city appointee. He said there is a disconnect on that issue. There is some support for having someone serve, but there is lack of support for having people ask others for money. He said maybe that is the political decision, but that is really two points in the mind of the commission in terms of serving as the appointee, and actually being involved in fundraising. He said the BYA has described fundraising as voluntary, not necessary. If a commissioner does become involved in fundraising, under the ordinance, does a conflict develop as a result of that, given his or her role as a commissioner.



Mr. Robb said under his theory, no, because the city has already determined it is important to have a commissioner on that board knowing he or she may have to assist in fundraising for the organization. The commission has considered it beneficial to the city for the organization to be successful.

Mr. Valentine said that is the struggle. The commission is not comfortable making the appointment with that understanding.

Mr. Schrot and Mr. Robb both agreed the commission should not make the appointment.

Mr. Schrot said this gets to the fundamental question of whether or not the city should be appointing commissioners. He said the city can do so, but at its own risk, and puts their fellow commissioner at risk of a violation of law and of the ethics ordinance. The commissioner has to understand that there are restrictions on how he or she can be used by that organization. The fact that the organization is soliciting the city suggests that they are doing so for certain benefit, which is apparent. Whether or not the city wants to participate in that type of engagement, whether or not the city wants to be involved in a selection process as to which organizations it is going to support and which organizations it is going to reject, it can make that the decision. The city could decide it is going to do so on any basis. He said as far as he can see, it is not a good practice. He suggested trying to address the issue of the practice of appointment.

Mr. Schrot and Mr. Robb inquired about a time limit. Mr. Valentine said the first question was in April 2016, so time is not critical.

Mr. Schrot said the historical answer has been that the city wants to help. He commended the city commission for addressing this issue, and he understands why there are differences of opinion. He said when one spends time on this in looking at the appointment, that seems to be a much simpler issue that can and probably should be resolved. When an appointment is made, a commissioner is wearing the city's hat when serving on the non-profit board.

Mr. Schrot provided the IGL article to be distributed to everyone. He said Ethics ordinance Section 2-234(a)(4), (6), and (7) regarding conflict of interest, and subsection (b)(1) regarding disclosure are the most applicable ones.

Mr. Currier said it is also important to consider Section 2-323(2) and (3) regarding appearances. Mr. Robb suggested subsection (5) as well.

Mr. Schrot suggested it might be helpful to meet with the city commission to talk about the practice of appointment as an agenda item. Mr. Valentine suggested it would be helpful to have specific questions for them to prompt the discussion and get that feedback from them. Mr. Robb suggested the board do more research before meeting again as a board.

Mr. Valentine asked what additional research is needed to allow ample time to do so and prepare for the next meeting.

Mr. Robb suggested that one question is, assuming the city appointed someone to a board, and that commissioner is soliciting funds for the organization, is that a violation of the law. Mr. Schrot agreed the board needs to do more research.

Mr. Schrot asked if a commissioner is appointed to the BYA board by the city, when he or she speaks, are they speaking on behalf of the city. The second question is, does that individual provide an appearance of speaking on behalf of the city. He asked how is that impacted by the Ethics ordinance. He suggested that the individual cannot give the appearance of speaking on behalf of the city absent specific direction from the city commission, and in a matter of personal interest. His concern is that it may put that commissioner at risk.

Mr. Robb said the safest way is not do it, but suggested that is not good guidance. Mr. Currier suggested it may be good guidance.

Mr. Schrot suggested letting the individual decide whether or not he or she is going to be involved, rather than involving the city commission in the appointment to the organization. Mr. Schrot asked if the commissioner has some discretion in accepting the appointment. Mr. Valentine said no one has turned it down.

Mr. Robb suggested scheduling another meeting after he and Mr. Schrot have done more research. Suggested dates and time will be distributed by the Clerk's Office for some time during the second week of January.

Mr. Schrot suggested the board may be going off on a tangent when discussing the practice of appointment to the organization because that is a different question. He thinks some commissioners may want to preserve the practice. He would want to determine what the benefit is to the city by appointing a commissioner to an organization. Mr. Valentine suggested at a minimum it is for the sharing of information. The initiatives are driven by the organizations, not by the city. He thinks the commission should focus on the price the city has to pay for honoring the request.

Mr. Currier said this discussion has shown that there is major difference between a city appointment vs. an individual's appointment by the board. The clean answer is the city should not appoint, and if you are appointed by BYA, the commissioner is still governed by the Ethics ordinance. Mr. Robb said it is easier to deal with if he or she is appointed by BYA and not the commission.

Mr. Schrot suggested the board could say to be aware that there are legal and ethical restrictions and provide the potential issues. If an issue comes up that relates to the non-profit, the citizens that elected the commissioner see that they are deprived of the commissioner's representation. This can be a political issue. When the commission understands the negatives, they may not want to participate in the future.

Mr. Schrot asked if there is state law that regulates the commissioners. Mr. Currier noted the incompatibility of office statute, and the Home Rule Cities Act which contains required charter provisions and form of government. It deals with city structure. The commissioners are bound by the U.S. constitution, the state constitution, state law and the city charter. There is a state ethics law that applies only to state officials.

<b>VI. PUBLIC COMMENT</b>
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<b>VII. ADJOURN</b>
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**MOTION:** Motion by Robb, seconded by Schrot:

To adjourn the meeting.

VOTE:           Yeas,    2  
                  Nays,   None  
                  Absent, 1 (Fierro-Share)

The meeting was adjourned at 5:15 PM.

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