

**CITY OF BIRMINGHAM
BOARD OF ETHICS MINUTES
JUNE 12, 2019
151 MARTIN, BIRMINGHAM
CONFERENCE ROOMS 202/203**

I. CALL TO ORDER

Chairperson Robb called the meeting to order at 3:00 p.m.

II. ROLL CALL

Present: Sophie Fierro-Share
James Robb, Chairperson
John Schrot

Absent: None

Also Present: Clinton Baller, Complainant
City Manager Joseph A. Valentine, Respondent
Mayor Patty Bordman, Respondent
Michael Sullivan, Attorney for City Manager Valentine and Mayor Bordman

Administration: City Attorney Currier, City Clerk Mynsberge

III. APPROVAL OF MINUTES

A. Approval of Board of Ethics meeting minutes of January 23, 2019

Chairman Robb pointed out typographical corrections as follows:

- Page 1, VI.B., Bullet point 3: Replace "and attorney" with "an attorney"
- Page 2, VI.B., Bullet point 4: Replace "preliminarily" with "preliminary"
- Page 2, VI.B., Bullet point 4: Insert "to" between "due" and "price".
- Page 5, VI.A., First paragraph: Replace "would" with "could".

Mr. Schrot suggested the following:

- Page 3, VI.A. Third to last paragraph: Replace "for the ordinance" with "of the awareness of the ordinance".

Ms. Fierro-Share noted a spelling correction on page 1: Replace "Fiero" with "Fierro".

MOTION: Motion by Chairman Robb, seconded by John Schrot:
To approve the minutes of January 23, 2019 as corrected.

VOTE: Yeas, 3
Nays, 0

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. HEARING ON ETHICS COMPLAINTS

1. 2019-03 Complaint: City Manager Joe Valentine, submitted by Clinton Baller.

Chairman Robb first noted for the record that there were two cases filed recently but then dismissed by the City Clerk administratively. Complaint #2019-01 was a complaint brought by Mr. Clinton Baller as was Complaint #2019-02. Because, for the most part, those complaints were addressed against the City Commission and Ad Hoc Parking Advisory Committee as bodies, which are not proper respondents in this kind of case, they were dismissed by the City Clerk administratively. Chairman Robb clarified that this hearing was to address Case #2019-03 Clinton Baller vs Joe Valentine (an individual).

Chairman Robb explained the Board of Ethics is a quasi-judicial body, not a court of record.

- In some respects, the Board acts like a court.
- In a case that involves a complaint there are procedures that are followed which can involve the receipt and review of a complaint and an answer on behalf of the respondent in advance or at the hearing. Answers to the complaint may be written or oral.
- The record is then opened for testimony on behalf of the complainant and respondent, followed by arguments and closing statements.
- Then the record is closed.
- Unlike courts, the Board decides the case by deliberating on the record in public. There is no communication between the board members ahead of time.
- Neither party in Complaint #2019-03 had any preliminary motions.

Mr. Schrot disclosed that he and Mr. Valentine are both members of the Birmingham Rotary Club, among approximately 50 other members; and believes that under the circumstances he can be impartial. Board members, complainant, and respondents indicated they were not concerned the relationship posed any conflict. There were no objections by either party.

Chairman Robb disclosed that his position on the Board was up for renewal last week at the City Commission meeting; Mayor Bordman recused herself in the meeting and was not present while the remainder of the City Commission considered his reappointment.

Mr. Baller, complainant, disclosed that there is a civil law suit pending against the City of Birmingham, Commissioner Nikita, and City Manager Valentine (an individual defendant in that litigation). City Manager Valentine is named both in his official role and in an individual capacity in that litigation. Chairman Robb thanked Mr. Baller for the disclosure.

Chairman Robb provided background, noting this matter has been somewhat of an issue of public controversy:

- This matter involves the upcoming development of the parcel of land at N. Old Woodward and Bates.
- The project is a \$127 million project and involves public and private elements of which \$57 million is for the public element, which is demolishing and rebuilding the parking structure.
- Based on the complaint in the federal court case, in order to attract qualified developers the City prepared a Request for Qualifications (RFQ) seeking parties who might be qualified developers and therefore entitled to receive a bid packet to bid on the project.
- The City selected four finalists to receive the Request for Proposals (RFP).

- An architect who was involved in the development of the RFP became a partner in Woodward Bates Partnership, which ultimately became the winning bidder.
- TIR Equities filed a complaint in federal court in January of 2019, about seven months after the bid was awarded.
- TIR is seeking injunctive relief and the declaration of rights and damages from the City of Birmingham, Commissioner Nikita, and City Manager Valentine.
- The defendants have filed motions for judgement on the pleadings.
- The motion has been briefed by all parties.
- Among the rationales expressed in the litigation, the plaintiff alleges that in the development of the RFP, City Manager Valentine and Commissioner Nikita violated the Code of Ethics by involving a member of the team which subsequently was awarded the bid.
- The defendants replied to the court that the plaintiff should have taken the issue to the Board of Ethics for an advisory opinion before the City awarded the development agreement to Woodward Bates Partners.
- The issue before the Board today in Complaint #2019-03 is currently before the United States District Court and was pending there before Complaint #2019-03 was filed with the Board of Ethics.

Chairman Robb wondered if one of the doctrines the lawyers would use as a matter of abstention or comity in reference to whether the Board should hear the case today. He recommended holding this particular complaint, #2019-03 in abeyance or dismissing the complaint without prejudice, allowing Mr. Baller to exercise his rights to bring back to the board again.

MOTION: Motion by Mr. Robb, seconded by Ms. Fierro-Share:

To dismiss Complaint #2019-03 without prejudice to Mr. Baller's right to refile the complaint after complete resolution of the federal court case, either by judgement or settlement, and after all appeals are exhausted.

Discussion:

Chairman Robb believes:

- That a decision by the Board could theoretically affect the decision in the federal court case because it is the very same issue.
- It is not the role of the Board to provide an interpretation to the United States District Court of the City's Code of Ethics.
- While the Board has jurisdiction to do so, and under its rules the Board has a duty to decide the case, there is not a duty to decide now.

Mr. Schrot was also concerned about the status of the court's decision.

- The question is whether or not any pending legal action involving the same parties involves the same subject matter of the complaint or substantially the same subject matter.
- In that regard, this Body has certain rules of procedure and Rule 302 pertains to dismissal. Rule 302, Subsection B, provides in part that the Board may administratively dismiss a complaint for either of the following reasons:
 - i. One or more complaints or requests for advisory opinions regarding the same matter are pending.

- ii. The Board previously addressed the subject matter.
- As noted by Mr. Robb, there appears to be a complaint pending citing an ethics violation because the City did not request an advisory opinion in advance.
- Mr. Schrot would like to have a procedure that is discretionary with the board should the board determine it to be appropriate.

Mr. Baller, complainant, presented his objections to the motion:

- Questions at hand today are narrower than those outlined in the pending lawsuit.
- The question is whether it was ethical for Victor Saroki to respond to an RFP that he helped develop.
- Frequently more than one judicial body deals with the same issues simultaneously (i.e. abortion, President Trump's actions). Therefore, it would not be improper for this Board to act today.
- He would like to see this Board show judicial independence from the federal court.
- Cited Section 302(b) (ii) of the City of Birmingham Board of Ethics Procedural Rules and interpreted it applicable only if another complaint was pending before this Board as opposed to pending before another judicial body.
- The project is moving quickly; voters would want to know the resolution of the Board prior to the election on August 6, 2019.
- The Board owes the residents of Birmingham a decision on this issue.
- He does not anticipate that the federal decision will be made prior to the election; and, if so, it could be settled between the parties and the residents will never know the decision.
- By not hearing the case or examining the facts, this Board is making a notion that it should not conflict with another judicial body. Mr. Baller feels that there is a note of fear in that approach. He went on to ask what would be the harm in making the decision today.

Attorney Sullivan commented:

- He has no problem with a dismissal without prejudice now. He was not anticipating this outcome today, but can see the wisdom of it.
- The fact that this complaint against Mr. Valentine was filed so shortly after the federal court pleadings is interesting timing.
- If federal courts would decide and say that there was no ethic violation, he guesses that this Board would likely be bound by the decision.
- He sees the potential for inconsistent results.
- Mr. Baller suggest in his complaint and in his remarks here today, that there is an ethical issue in connection with allowing Victor Saroki to participate in that bid.
- The City of Birmingham's attorney thoroughly and vigorously vetted the bid.
- Including a conflict of interest clause was suggested. City Attorney Currier opined there was no legal requirement to exclude the consultant from such bids, but as a matter of good practice, it is not a bad idea.
- The restricted RFP was issued, and there were no bidders.
- Attorney Currier advised that it would be okay to lift the restriction; the City Commission authorized it.
- Without that restriction, four bids were submitted.
- He and his client will defer to the wisdom of the Board.

Chairman Robb noted:

- He could not anticipate what effect a decision of the Board would have on the pending litigation.

- He was further struck by the fact that Mr. Baller's complaint was filed less than two weeks after the City defendants raised the argument.
- If the plaintiff felt that there was a problem, there was opportunity to come before this Board before the City issued the contract.

Mr. Baller stated:

- The ethics issue came up in the original complaint. He believes that there is an intimation that the timing of his complaint has something to do with the lawsuit or that he is conspiring with the developer.
- Another resident pointed out the Board of Ethics' rules to him and suggested that he file an ethics complaint.
- The Board needs to render a decision before August 6, 2019. The election is more about the development of the entire site as opposed to just the parking structure. The electorate is entitled to the truth.
- He feels very strongly that if the citizens found that the City acted unethically, in the process it used to develop the site, the electorate would use that as a factor in whether to support the bond issue.

Mr. Schrot asked:

- What is the context of the allegation of a violation of the ethics ordinance? In other words, what cause of action does that relate too?

He noted:

- If the allegation is that one or more of the parties should have come before this Board seeking an advisory opinion, the Board cannot cure it.
- There are no identity of parties in relation to the U.S. District Court case and this ethics complaint; meaning Mr. Baller is not the plaintiff in the court case and TIR is not a complainant in this proceeding. Therefore, the parties are not identified.

Mr. Baller stated:

- It raises the point of the role of the court and the role of this Board.
- The court is hearing a civil action where they may find tort damages. Whether they will opine on ethics, is anybody's question.
- This Board is focusing solely on the ethical question. Whether there is damage to TIR, or the citizens of Birmingham for that matter, is not this Board's decision.
- While the questions are similar, they are not the same.

Chairman Robb pointed out:

- The original complaint lists count 1 as a violation of due process, and alleges that the plaintiffs have the right to be free of capricious and arbitrary, fraudulent conduct, unjust conduct, and conduct in violation of trust. It should be done in a matter that is fair and free from favoritism and conflicts of interest. It is cited in the claim against Mr. Valentine, personally.
- The second count is declaratory judgement for declaration that the competitive bidder process used by the defendants deprived the plaintiffs of their constitutional right to due process.
- Relief sought is preliminary and permanent injunction in joining the finalization of the contract ordering the defendants to conduct the bid/selection process in a manner that complies with constitutional requirements.

- In this case, the issue was raised first in Federal Court and is not settled yet. This Board will have jurisdiction to resolve this matter once the courts make a decision.
- In respect to the process, he does not think the case should be decided today.

Ms. Fierro-Share noted Mr. Baller is concerned about getting something settled before the election, and asked how the court decision will affect the election.

Mr. Schrot:

- Asked if there is an allegation of Mr. Valentine having violated the ethics ordinance, and/or is it stated that he should have sought an advisory opinion.
- He reiterated that Mr. Baller would still have remedy with this Board.

Mr. Baller requested clarification and asked the Board to rule on whether or not the City violated the ethics ordinance in respect to bid and award processes.

Mr. Schrot said:

- He does not want the courts to use the Board's decision to decide the lawsuit.
- He feels it is inappropriate to have two triers of fact.
- The court complaint alleges civil rights violations and constitutional violations.
- He is inclined to support the motion.

Attorney Sullivan stated he and his client are content to abide by the decision of this Board. He agreed with the motion, and did not want any suggestion in the record that Mr. Valentine committed any ethic's violations.

VOTE: Yeas, 3
 Nays, 0

The initial draft of the opinion was assigned to Chairman Robb.

2. 2019-04 Complaint: Mayor Patricia Bordman, submitted by Clinton Baller.

Mayor Bordman was represented by Attorney Michael Sullivan.

Chairman Robb expressed that both parties are entitled to opening statements. He went on to say that there might not be a dispute of the facts; in that case, the process would be streamlined. Chairman Robb questioned Mayor Bordman and City Manager Valentine under oath, and determined that all parties agreed with the facts as stated below:

- Complaint #2019-04 surrounds generally the award of a contract to develop a city-owned parcel located near Old Woodward and Bates Street.
- The project combines public aspects, particularly a substantial parking structure to replace an existing, older structure, with private aspects including commercial and residential uses.
- The City issued an RFQ and later an RFP for proposals to develop the site.
- The Birmingham Ad Hoc Parking Development Committee reviewed the proposals and recommended to the City Commission that Woodward Bates Partners be awarded the project.
- The parking structure is to be funded by unlimited tax general obligation bonds,
- Because the bonds are an unlimited general obligation of the City, the City's voters must approve their issuance in an election.

- The amount of the bonds is not to exceed \$57,400,000.
- The total cost of the public-private development project is an estimated \$127,000,000.
- The development agreement with Woodward Bates Partners specifies the developer will pay \$20,000 toward the costs of the August 6, 2019 special election. The payment is non-refundable.
- Ms. Bordman became a member of the City Commission in November 2015.
- She voted on the contract and signed the contract on behalf of the City as authorized by the City Commission per City ordinance.

Mr. Baller, noting the timing of when the agreement was presented and the number of drafts of the agreement, questioned if the City Commission had time to read the agreement and give it proper consideration.

Attorney Sullivan felt Mr. Baller was raising issues outside of the complaint.

Mr. Schrot noted the complaint states there was an offer by the private developer to defray the cost of the election. He asked if that is an undisputed fact or an assumption by Mr. Baller that it was an offer by the developer.

Chairman Robb suggested the Board settle some other facts as well, specifically Victor Saroki's involvement. He called City Manager Valentine to testify under oath.

In answer to Chairman Robb's questions, Mr. Valentine stated:

- The project was designed under review by the Ad Hoc Parking Development Committee made up by City residents appointed by their roles and specialties within the City organization:
 - Scott Clein, Planning Board
 - Richard Astrein, Birmingham Shopping District
 - Judy Paskiewicz, Advisory Parking Committee
 - Terry Lang – Resident with a financial background
 - Gordon Rinschler – Resident with a commercial development background
 - Mark Nickita, City Commissioner
 - Rackeline Hoff, City Commissioner
- Saroki Architecture and Walker Parking Consultants were advisors on the project.
- Woodward Bates Partners negotiated with City for \$20,000 to defray the cost of the special election.

Mr. Baller disputed the facts alleged in Mayor Bordman's sworn statement. Attorney Sullivan pointed out 1) the Commission voted 5-2 to approve the development agreement; and 2) as Mayor, Ms. Bordman is required to sign an agreement approved by the Commission.

Mr. Baller asked about the genesis of the developer paying \$20,000 toward the special election. Attorney Sullivan explained it was a negotiated term between the City and the developer, and both parties were represented by counsel.

Chairman Robb called for arguments.

Mr. Baller:

- Public officials should have the highest standard to safeguard public confidence.

- The City undermined his respect by accepting \$20,000 for the election to support the bond issue to finance the Woodward Bates Project.
- City employees should avoid action that adversely affects the integrity of the city government.
- Officials should avoid any action that would appear adverse. Allowing a private developer to pay for the election does not pass the test, because the developer has a vested interest in holding the election and will move any obstacles to close the deal. The developer cannot realize profits without the election.

In response to questions from Chairman Robb and Mr. Schrot, Mr. Baller said:

- The \$20,000 toward the special election is not the same as the City requiring infrastructure improvements adjacent to a development.
- Offering money to defray the cost of a special election to remove an obstacle might create the appearance of unethical behavior. The vote could have been held in November at the regular election. Holding a special election adds additional costs.
- From an ethical standpoint, the citizens should pay for the election, not the developer.

Mr. Schrot, noting the confidence of the public is important to the Board and to Mr. Baller, asked if the City getting a break from the contractor on the expense of the special election undermines the confidence of the citizens as it relates to its government. Mr. Baller answered yes and stated elections are sacred.

Ms. Fierro-Share commented that Mr. Saroki's involvement in developing the RFP and RFQ is akin to writing the questions for a test that he is taking. She asked where he fits into the complaint. Mr. Baller explained the complaint currently under review is against the Mayor and, by extension, the Commission and the City.

Chairman Robb asked how Mayor Bordman's vote in favor of the agreement, which contained the clause that the developer would pay \$20,000 for the special election, caused her to lose complete independence or impartiality of action as alleged by Mr. Baller. Mr. Baller answered it is that the clause is in the contract. The interest of the developer is in greasing the skids as much as possible to get the project approved. Anticipating that some commissioners might object to cost of special election, the developer removed the obstacle.

Ms. Fierro-Share asked if it is unusual for a contractor to participate in the cost of a special election. City Attorney Currier said it has happened in other communities; he is not aware of it having happened in Birmingham.

Mr. Baller felt that Mayor Bordman's defense was not valid:

- He did not threaten her.
- He said to her after the meeting at which they verbally sparred over speaking time, "wait 'til you see it on YouTube."

Attorney Sullivan said:

- That what he just heard was Mr. Baller wanted to hurt Mayor Bordman in the court of public opinion.
- Mr. Baller agreed that special elections are appropriate and that it is okay for a developer to offer inducements to make a development more palatable to the residents.
- There are no legal impediments preventing this type of negotiations.

- The City Commission negotiated the contract based on the City Clerk’s estimate of the cost of the election.
- The Mayor did not negotiate the contract.
- The Mayor is obligated to sign the contract.
- There is nothing procedurally wrong with respect to the Mayor’s actions.
- The City retained experts to negotiate the contract. It is common to negotiate terms like this.

City Manager Valentine stated the funds from the developer would not be used for promotion of the election.

MOTION: Motion by Chairman Robb, seconded by Mr. Schrot:
To close the proofs for Complaint #2019-04.

VOTE: Yeas, 3
 Nays, 0

Mr. Schrot does not believe that there is any semblance of ethical violations in any regard. The Mayor did not lose any independence by her vote or signing the agreement. The Mayor took no actions that adversely affected the confidence of the public. He did recognize Mr. Baller’s concerns and knows that he has a sensitivity to this subject, but not the same sensitivity as the public as a whole. Mr. Schrot further expressed concerns about the exchange that has taken place between Mr. Baller and Mayor Bordman. He hoped their relationship would improve so that in the future there is no appearance of conflict between the two individuals.

Ms. Fierro-Share agreed with Mr. Schrot and believed that Mayor Bordman worked hard to be part of the Commission, has done a good job, and has a strong sense of civic duty. She also said that Mayor Bordman should never be made to feel uncomfortable or unsafe. Ms. Fierro-Share further noted that Mayor Bordman and the City Commission are bringing great things to the City. In the future, she would like to see all comments and behavior kept professional.

Chairman Robb stated:

- As to the Mayor signing the contract there is not any question of an ethics violation because, by oath of office and Article VII of the City Charter, the Mayor is required to sign contracts on behalf of the City once authorized by the City Commission.
- On the allegations of impartiality and integrity he is not convinced that Mayor Bordman has lost any independence.
- The Mayor has a right to vote on any contract.
- No ordinances were violated.
- He believes that sometimes government agencies ask for too much. In this case \$20,000 is not disproportionately high to the total contract price, is legal, standard conduct, and commonly done.

MOTION: Motion by Chairman Robb, supported by Mr. Schrot:
To dismiss the case and find that the conduct as alleged as adduced in the proofs in the record comports with the ethics ordinance.

VOTE: Yeas, 3
 Nays, 0

The initial draft of the opinion was assigned to Chairman Robb.

City Attorney Currier reiterated that bond funding is only for the public component of the project, specifically parking and the parking garage.

B. Supplemental Opinion to Advisory Opinion 2018-02A

Chairman Robb expressed that Ms. Fierro-Share wants her supplemental opinion entered into record.

Chairman Robb suggested a working meeting, including City Manager Valentine, City Attorney Currier, and City Clerk Mynsberge to create guidelines for recusal based on conflict of interest.

Ms. Fierro-Share suggested that the Ethics Board simply strengthen the guidelines that are already in place.

Mr. Schrot passed out information from the "Food for Thought" seminar and General Ethics Principals "Do's and Do Not's".

Ms. Fierro-Share said it is worth considering amending the ordinance. Mr. Schrot and Chairman Robb suggested that Ms. Fierro-Share submit proposed ordinance amendment language in writing.

MOTION: Motion by Chairman Robb, supported by Mr. Schrot:

To accept into the record in the advisory opinion case #2018-02 Ms. Fierro-Share's supplemental opinion, post on the website as "Supplemental Opinion by Ms. Fierro-Share in Case #2018-02". It should show up as a separate opinion.

VOTE: Yeas, 3
 Nays, 0

VI. PUBLIC COMMENT

None.

VII. ADJOURN

The meeting was adjourned at 5:34p.m.

J. Cherilynn Mynsberge, City Clerk
/vc