

**City of Birmingham
Board of Ethics Minutes
June 15, 2022
151 Martin, Birmingham**

I. CALL TO ORDER

Chair Schrot called the meeting to order at 2:00 p.m.

II. ROLL CALL

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

Absent: None

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

III. APPROVAL OF MINUTES

Ms. Fierro-Share recommended that a superfluous 'that' be removed from page two.

On the same page, the Chair recommended that 'complaint' be changed to 'request'.

MOTION: Motion by Mr. Robb, seconded by Ms. Fierro-Share:
To approve the minutes of November 16, 2021 as amended.

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

Nays, None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

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

Chair Schrot noted that the Board was in receipt of letters from Planning Board members Scott Klein, dated June 8, 2022, and Jason Emerine, dated June 9, 2022. The Chair then explained from where the Board derives the authority to offer advisory opinions, and noted that the Board's page on the City's website outlines the Board's rules of procedure, mission statement, training sessions, and previous advisory opinions. He then summarized the process that would be followed for reviewing the request.

Ms. Fierro-Share informed the Board that her husband, Dan Share, currently serves on the Planning Board with Bert Koseck. She stated that she had never met Mr. Koseck, saw no issue with her participating in the proceedings, and asked that she be permitted to participate unless there were concerns.

No concerns were stated by anyone present.

In reply to Mr. Robb, Mr. Koseck stated there had been no discussions between himself and Mr. Share regarding Request 2022-02.

CA Kucharek clarified that Mr. Koseck had reached out to Mr. Share, but that Mr. Share had said he could not discuss the matter with Mr. Koseck. Ms. Fierro-Share was not part of that exchange and had no contact with Mr. Koseck.

The Chair then swore in CM Markus and asked him to review his request.

The City Manager prefaced his request by stating that he respects Mr. Koseck and regards him as a valued member of the Planning Board. He noted that he had the option to file a complaint or a request for an advisory opinion and chose the latter. He explained that requesting an advisory opinion regarding this matter was part of his professional obligation.

The City Manager then provided an overview of Request 2022-02, which can also be found described in the meeting's agenda packet.

In reply to Board inquiry, CM Markus explained:

- The determination regarding whether an item should be reviewed administratively or should be brought before the Planning Board is done by Staff;
- He did not believe that Messrs. Clein or Emerine discussed their conversations with Mr. Koseck with other Planning Board members or with Staff;
- There are seven regular Planning Board members plus two alternate members;
- The conversations between Mr. Koseck and Messrs. Clein and Emerine would have occurred prior to January 20, 2022;
- On page two of his request he should have referred to a public meeting instead of a public hearing;
- As a City Manager he was obligated to protect subordinate Staff if and when certain levels of issues arise from Board members. He said he would expect future City Managers to do the same. He said he was also obligated to ensure that the record is clear and that the City is following the procedures of the Ethics Code;
- There was a consensus decision by the Planning Board at its February 9, 2022 meeting that the Cannelle Patisserie (Cannelle) plans could be administratively reviewed and approved; and,
- He suspected that the Planning Board was asked to give direction regarding whether the Cannelle plans should be administratively reviewed or reviewed by the Planning Board in part because of Mr. Koseck's involvement and Mr. Koseck's reference to two other Planning Board members.

CC Bingham noted that Mr. Koseck was absent from the February 9, 2022 meeting and that both Messrs. Clein and Emerine were present and serving at that meeting. She then read the section of those minutes under Pre-Application Discussions.

The Chair then swore in Mr. Koseck.

Mr. Koseck introduced himself to the Board. He then stated:

- He volunteers on the Planning Board because he loves Birmingham and believes his professional background helps him contribute to the City in a positive way;
- He has never volunteered for personal or professional gain, or behaved unethically in any way. His personal and professional contacts would corroborate those statements;
- In his volunteer service with other organizations and his professional work his ethics have never been called into question;
- His work with Cannelle began as helping a neighbor without compensation and transitioned to a paid, professional architect-client relationship likely in mid-August 2021 as the project evolved into redesigning a previously approved outdoor dining facility. His work was to redesign and to assist in getting approvals from the City;
- Working with City Staff during that process was at times confusing, aspects of their demands did not make sense, there were communication gaps, missed information, and slow responses;
- After many months he became frustrated, saw no end to the entitlement process, and went above those particular Staff members' heads to the Assistant City Manager and the City Manager, both of whom he asked for help;
- He suspects that Staff then raised the present Ethics issues as a defense since Mr. Koseck had gone over their heads;
- He did not know whether the project is fully approved or whether a building permit was yet issued but he believed it was close, despite these issues. He was happy for that and for his client;
- In a passing conversation with the City Manager in early April 2022, the City Manager expressed a desire to meet with Mr. Koseck regarding Cannelle. That meeting was held on April 28, 2022 and included ACM Ecker and CA Kucharek;
- During the meeting, CM Markus read the request for an advisory opinion to Mr. Koseck and said he would be submitting it; and,
- He wished that they had more time to discuss the issues during that meeting. He said he was deeply saddened by CM Markus' decision to submit the request to the Ethics Board.

Mr. Koseck then passed out copies of, and reviewed, a presentation explaining the Cannelle process. He asked that his presentation not be taken as an indictment of the Community Development Department in general, and said his interactions with Staff in that department in general have been wonderful. He said he was only speaking regarding this experience as an architect representing a client.

In reply to Board inquiry, Mr. Koseck explained:

- He became frustrated as the entitlement process went on;
- At some point, he asked Staff for the requirements in writing because he felt he was not getting clear information, and when Staff subsequently made two requests for additional information he became unhappy;
- He likely spoke to Mr. Emerine twice about the project, once in July 2021 and once in March 2022;
- The Planning Board said the project could be administratively reviewed and approved on February 9, 2022, which meant that neither Messrs. Clein or Emerine would have a need to comment on the project in their capacities as Planning Board members again;
- When the site of Cannelle in general was before the Planning Board on March 9, 2022, it was in regards to a sitewide project and not Mr. Koseck's project;

- He neither showed the Cannelle plans to Messrs. Clein and Emerine nor represented that he did to Staff;
- He did mention his discussion of the Cannelle plans with Messrs. Clein and Emerine to Staff once, which he believes occurred after March 9, 2022;
- In mentioning the opinions of Messrs. Clein and Emerine to Staff, he was aware that Staff was aware that Messrs. Clein and Emerine are Planning Board members;
- He did not mention their names, however, in an attempt to influence Staff, nor did he represent that Messrs. Clein and Emerine said the project should be permitted above the easement. Mr. Koseck said they actually both said that the Engineering Department had discretion in the matter;
- He never referenced his position as a Planning Board member to Staff, nor asked for any favoritism;
- He referenced Messrs. Clein and Emerine regarding the technical, engineering-related items of the soil boring request and the easement, saying they did not have concerns about those aspects of Mr. Koseck's plans. The 'bullshit' was quoting a civil engineer and surveyor who told Mr. Koseck that he would no longer work in Birmingham; and,
- In his frustration, he used a blanket statement.

Ms. Fierro-Share noted that CM Markus indicated that there were Staff members who were hurt, insulted, frustrated, and angered by the way Mr. Koseck behaved in his frustration.

Mr. Koseck said he was disturbed by the content of the request for the advisory opinion, indicating that he did not recognize himself in the description. He conceded that he was angry by late Winter-early Spring 2022, when he said he had not received answers for months.

Ms. Fierro-Share asked Mr. Koseck if he accepted responsibility for how Staff may have been injured as a result of his anger. She described him as having lost his temper.

Mr. Koseck said the conversation with SP Cowan that was quoted in Request 2022-02 was likely no more than two minutes, and that he would have expressed himself the same way to another jurisdiction. He said he also apologized about two weeks later and instructed SP Cowan not to take it personally. He said he sees himself as a mentor. He said he would not describe himself as having 'lost his temper', but said he was short, frustrated, and went above SP Cowan's head. He said going above SP Cowan's head 'was probably when he had to defend himself'.

The Board invited closing statements.

CM Markus noted:

- That 'easements, sewers, and soils' as referenced on page ten of Mr. Koseck's presentation were described as being excluded from Planning Board review, when in fact they are tangentially related to items the Planning Board reviews, such as parking, which were part of the Cannelle plans; and,
- While Mr. Koseck said that the plans for the whole site and the plans for Cannelle were separate, the two items were related because items that come up for one set of plans affect the other set and some of them could result in a full site plan review which is the purview of the Planning Board.

Mr. Koseck stated:

- Based on the scale and specific items to be addressed, he never thought the Cannelle plans would become an item on the Planning Board agenda. He spoke to Messrs. Clein and Emerine believing the matter would not go before the Planning Board;
- Cannelle is a good operator and has had a positive impact on the surrounding neighborhood. While many development plans can be contentious, no one except for a couple Staff members would have had an issue with the plans for Cannelle;
- He encountered roadblocks, confusion, complexity in working with certain Staff members;
- The final requests from Staff cost Cannelle thousands of additional dollars and the reason for those final requests was not conveyed;
- He is generally appreciative of, and impressed by, Staff;
- He would have reacted the same way if this had occurred in a different municipality;
- He would not characterize follow-up emails and phone calls when no response had occurred after a number of days as 'excessive'; and,
- During this entire process, he was an architect representing a client and not acting as a Planning Board member.

CM Markus stated:

- The six projects Mr. Koseck compared to Cannelle were too dissimilar to be analogous;
- The final requests that Staff issued to Mr. Koseck occurred because the City Attorney was in the process of drafting a hold harmless agreement for the Cannelle project and because the potential piers and poles could have had an impact on the surface of the easement. Each change in the variables of the project prompted the need for other information; and,
- It is appropriate for development to undergo a thorough review process and Birmingham residents would be dissatisfied if that did not occur.

The Chair offered Mr. Koseck a final remark. Mr. Koseck declined. The Chair then invited Board deliberations.

Ms. Fierro-Share said Mr. Koseck seemed to have escalated the situation and to have taken his frustrations out on Staff in this case, despite not identifying as someone who would do so. She said his behavior moved into bullying, and that there was no excuse for it. She said Mr. Koseck wanted the process to go according to his schedule, and that was not how it works. She said the situation was regrettable. She continued that she had three questions:

1. Can a Board member represent a private client before the City in a matter not requiring Board action?
2. Can a Board member represent a private client before a Board he or she does not serve on?
3. Can a Board member represent a private client before a Board he or she does serve on?

She answered yes to question one, yes to question two, and no to question three. The issue that unites the questions is what the Ethics ordinance expects of Board members who interact with Staff or their fellow Board members on behalf of clients and neighbors. The ordinance does not provide clear guidance on all issues that may arise, and so Board members need to continually evaluate their ethical obligations.

Ms. Fierro-Share continued that:

- Section 2-324(a)(5) requires that Board members hired to represent a client before the City ensure that they are hired for the right reasons;
- Section 2-324(a)(6) requires that Board members not accept employment inconsistent with their duties or that would impair their independence;

- It is permitted to take private employment that would not do those things as long as a disclosure statement is made on the public record per Section 2-324(b)(5);
- Mr. Koseck's employment by Cannelle was not before the Planning Board while he was present at a Planning Board meeting;
- Section 2-321 requires City officials to be respectful of the conduct of City business. If the average Staff member felt intimidated or coerced by an official's behavior, that violates the ordinance;
- The bullying that occurred in this case could also raise issues with Section 2-324(a)(8). Disagreement with Staff alone does not violate this section, but crosses the line when it moves from vigorous advocacy to bullying, as it did in this case;
- The bullying, however, occurred in Mr. Koseck's private capacity, and not as a public official;
- While she did not condone these aspects of Mr. Koseck's behavior, she did not believe it was covered by the Ethics ordinance;
- There was nothing improper about Mr. Koseck asking Messrs. Clein and Emerine for information based on their specific fields since there was no indication that the matter would appear before the Planning Board, and there was also no indication that Mr. Koseck would not have disclosed the conversation and potentially recused himself if it had gone before the Planning Board;
- The letters from Messrs. Clein and Emerine indicated that Mr. Koseck undertook no lobbying for a specific outcome if the matter had gone before the Planning Board;
- There was no indication that Mr. Koseck intended to make a behind the scenes case for his client. His behavior in this regard did not violate Section 2-323(1), Section 2-323(2), or Section 2-323(3) or Section 2-324(a)(5); and,
- Section 2-324(b)(2) does not apply to this request because the conversations with Messrs. Clein and Emerine occurred well before Mr. Koseck knew it might come before the Planning Board.

She concluded that Board members who take on private work that involves the City must be constantly ethically vigilant in every way.

Mr. Robb said:

- He was concerned about a Planning Board member consulting with fellow Planning Board members about a matter that could come before the Planning Board;
- Even though Mr. Koseck reported not thinking that the Cannelle plans would come before the Planning Board, he was not only required to avoid true conflicts of interest, but to also avoid creating the appearance of a conflict of interest;
- Mr. Koseck's behavior in this case could have given the appearance of a conflict of interest since it could have seemed like he was seeking special consideration for his client;
- While Mr. Koseck contends he would have reacted the same way in another municipality, he is not a public official in those municipalities;
- As public officials in Birmingham, when interacting in Birmingham there is an 'overlay' of conduct above and beyond one's normal business and personal conduct due to one's status as a public official;
- While Messrs. Clein and Emerine might provide good engineering insight, it might be appropriate for Mr. Koseck to consult other engineers he knows and respects on a project that might end up before the Planning Board;
- While he trusts that Mr. Koseck would have recused himself had it come before the Planning Board, Messrs. Clein and Emerine did not recuse themselves from the

conversation regarding whether the Cannelle plans should be administratively approved or brought before the Planning Board;

- He conceded that the conversations between Mr. Koseck and Messrs. Clein and Emerine may have been technical and non-Planning Board related, but he cannot know for sure how the conversations with Mr. Koseck impacted Messrs. Clein's and Emerine's opinion on how the project should be reviewed, thus giving rise to the possibility of an perceived of a conflict of interest; and,
- He agreed with Ms. Fierro-Share's comments.

Mr. Robb concluded that this advisory opinion would benefit the community, reiterated that it was not a complaint, and thanked both CM Markus and Mr. Koseck for discussing the issue so forthrightly.

Chair Schrot echoed that this was an advisory opinion and not a complaint. He said he also concurred with Ms. Fierro-Share and asked if she would write the advisory opinion. The Chair continued that:

- While Mr. Koseck contended that he did not expect this matter to come before the Planning Board, there remained that possibility;
- This fact was his main concern;
- Public officials have two sets of fiduciary responsibilities - to individual clients, and to the City;
- Public officials maintain their fiduciary responsibility to the City for as long as they serve, and so if they voluntarily take on an additional set of fiduciary responsibilities to a client they have to be mindful of the implications;
- Doing so does restrict on occasion what a public official may do for, and on behalf of, a private client;
- It also impacts how a public official should conduct themselves in dealing with the City;
- He agreed with Mr. Robb that there is a heightened standard as a Birmingham public official conducting business in Birmingham;
- He does believe that the request for an advisory opinion from CM Markus does have application in this matter, but he has some concerns about some of the factual accuracy of some of the allegations because there is some dispute about certain statements;
- Overall, he was persuaded that there was sufficient evidence to generally regard CM Markus' request as accurate;
- There was no indication that Mr. Koseck was acting 'behind the scenes' in an attempt to secure favorable consideration; and,
- These kinds of issues have arisen before, noting that advisory opinions 2003-01, 2003-02, 2003-03, 2009-02, 2012-01, 2015-05, 2015-07, and 2018-02 all had some relevance to the present request.

The Chair asked Ms. Fierro-Share to bring aspects of those opinions to bear on the writing of this advisory opinion as she saw fit.

Mr. Robb explained that Ms. Fierro-Share would then author the advisory opinion and the Board would review it at the next meeting.

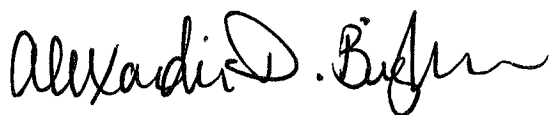
The Board concurred that the advisory opinion would be reviewed subsequent to any new business occurring at the next meeting.

VI. PUBLIC COMMENT

VII. ADJOURN

MOTION: Motion by Mr. Robb, seconded by Ms. Fierro-Share:
To adjourn the meeting at 4:53 p.m.

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



Alexandria Bingham, City Clerk



Laura Eichenhorn
City Transcriptionist