

**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

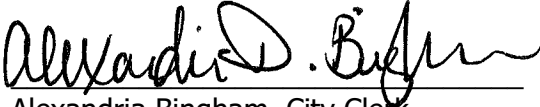
VI. PUBLIC COMMENT


None.

VII. ADJOURN

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


Alexandria Bingham, City Clerk


Laura Eichenhorn, City Transcriptionist