

CITY OF BIRMINGHAM

BOARD OF ETHICS

ADVISORY OPINION 2022-02

QUESTIONS PRESENTED¹

Do the actions of an architect, who is also a member of the Birmingham Planning Board, in promoting his client's building project to the City's Planning Department violate the Birmingham Ethics Ordinance, because of either:

1. The nature and tone of the verbal statements to Planning Department staff made in support of that project; or
2. The mention—and quoting—to Planning Department staff the opinions of two other Planning Board members who are civil engineers on an engineering matter pertaining to the project?

STATEMENT OF FACTS

Bert Koseck is an architect and a member of the Planning Board. He was hired by a Birmingham business to provide architectural services in connection with modifications that business hoped to make to its building. The modifications required one or more City approvals. It is unclear if the modifications required Planning Board approval. Mr. Koseck did not think so.

There were several discussions between Mr. Koseck and City staff about what, if anything, could be built over an easement on the site and what kind of site plan review is required. The issues were not resolved in a time frame satisfactory to Mr. Koseck. He became frustrated by the length of time it was taking to resolve the matters and with the substance of the responses he was getting from the Engineering Department and from the Planning Department. According to the Request, which Mr. Koseck did not dispute, he made "continued efforts.....to push the staff, with almost daily or every other day emails.....attempting to bypass the need for Planning Board review." He was angry, raised his voice, used profanity and named—and quoted—two Planning Board members who are civil engineers in support of his position. In none of these interactions did Mr. Koseck identify himself or the two engineers as Planning Board members, though the City staff was well aware of each of their affiliation with the Planning Board.

Mr. Koseck told the Ethics Board that he did not intend to use his Planning Board membership to get special treatment. The Request states that "Many of the staff members felt as though they were

¹ The Ethics Board is acting in Response to a Request for Advisory Opinion. Advisory Opinions often deal with questions about how City Officials should act in the future based on an assumed statement of facts. Advisory Opinions differ from Complaints, where we are asked to judge whether past conduct violates the Ethics Ordinance. Compare Chapters 2 and 3 of the Board of Ethics Procedural Rules. We have also issued Advisory Opinions concerning past conduct where it is useful to provide City Officials with guidance in situations which might occur in the future. Advisory Opinion 2004-01. This Advisory Opinion serves that purpose.

being pressured to change their opinions for Mr. Koseck because he is on the Planning Board.” The two engineers, Scott Clein and Jason Emerine, each wrote a letter to the Ethics Board in which they described their conversations with Mr. Koseck. Both stated that Mr. Koseck asked them technical, engineering questions and they did not feel pressured by Mr. Koseck. Mr. Clein stated that Mr. Koseck “did not ask for nor imply in any way that he wanted my assistance with any approval.” Mr. Emerine wrote that it did not appear to him that Mr. Koseck “was asking for my support of the project, attempting to influence my decision-making process or gain a ‘favorable decision’.”

The Request for Advisory Opinion asks for guidance on whether the facts submitted to the Board show the use of a public position for private gain, either in the way in which Mr. Koseck behaved to the City staff or by his consulting two Planning Board members before a public hearing. These are important questions. The Ethics Board believes this Advisory Opinion can help clarify the rights and duties of appointed board members when they seek something from the City in their private capacity.²

ANALYSIS

The Ethics Ordinance recognizes that volunteer board members are different from full or part time paid employees. Section 2-324(a)(6) has a general prohibition applicable to all city officials and city employees against the acceptance of employment where it is “incompatible or in conflict with the discharge of his or her official duties”, but goes on to say that Commissioners or board members may engage in private employment on their own time “where city business is not involved, subject to” disclosure and refraining from participating in that matter.

Section 2-324(a)(9) recognizes that Board members may participate in decisions even though their financial or personal interests may be directly or indirectly affected if it is in furtherance of the public good, in compliance with the duties on their board and is not an effort to gain some benefit not available to the general public.

Section 2-324(b) sets out the process for disclosure of conflicts of interest and requires a board member to refrain from voting or discussing a matter in which they have a direct or indirect financial or personal interest.

Putting all these provisions together and applying them to the facts presented to us, we conclude that a board member may accept private employment on behalf of someone with business before the City except in three cases: where board member or the board member’s client is selling goods or services to the City (the “city business” referred to in the exception of Section 2-324(a)(6)); where the board member has a fiduciary duty to both the client and the City (Advisory Opinion 2015-05); or where the employment would “tend to impair his or her independence of judgment or action in the performance of his or her official duties” Section 2-324(a)(6). If the employment is permitted, the

² We have not been asked to and do not directly address any issue relating to conflicts of interest. Our Advisory Opinion 2018-02 contains a thorough analysis of apparent, potential and actual conflicts of interest. That Advisory Opinion is especially relevant to appointed board members. We recommend that all board members contemplating doing any business with the City review Advisory Opinion 2018-02 and, for those contemplating doing business with the city on behalf of someone with whom they have a fiduciary relationship, that they read Advisory Opinions 2003-03 and 2015-05.

conduct of the board member is private conduct, not official conduct. Where the employment is permitted and a board on which the member sits has to consider it, the board member must disclose the employment on the public record and may participate as a board member if the standards of 2-324(a)(9) are satisfied and there is no conflict of interest as defined in the Ethics Ordinance.³

There is another aspect to the question of whether private employment is prohibited by the Ethics Ordinance. Section 2-324(a)(5) states that no City Official may engage in a business transaction that he may profit from due to his official position. This Section echoes the general prohibition against using public office for private gain in Section 2-320(3). There is no indication why Mr. Koseck was hired. He may have been hired because his client thought his status as a Planning Board member will help get things done quicker or more satisfactorily. Or he may have been hired for his skill, experience, cost or some other reason unrelated to his membership on the Planning Board. It is important for a Board member who is hired to represent a client before the City to be sure he or she is being hired for the right reasons. Promises of success because of one's status as a board member are inconsistent with the Ethics Ordinance.

The Ethics Ordinance seeks to give guidance to public officials for separating their public and private roles. Section 2-320. The Ethics Ordinance seeks to assure public trust in government by fostering independence, impartiality, proper procedures and the use of public resources solely for public purposes. Section 2-321 requires city officials and employees to "observe in their official acts the highest standards of ethical conduct."

We are called upon to consider two aspects of Mr. Koseck's conduct: (1) the manner in which he interacted with the City staff, specifically the intensity with which he spoke to city staff in tone and frequency and (2) whether contact with other board members pertaining to his private employment is permitted. Because this is an Advisory Opinion, we focus on providing guidance as to what the Ethics Ordinance requires rather than adjudicating whether all or any part of Mr. Koseck's conduct violates the Ethics Ordinance.

1. We turn first to the question of whether the Ethics Ordinance limits what a city official can say or how they say it. As noted, Section 2-321 requires city officials to be respectful, honest and fair and to avoid conduct which "may tend to undermine respect" for the official or the city. These are imprecise standards. There is no simple test dividing respectful from disrespectful conduct. We can all agree that there are characteristics of communication that are not acceptable. "Bullying" is defined by the Oxford Languages English Dictionary as: "to seek to harm, intimidate or coerce someone (someone who is perceived to be vulnerable)." If the average person in the position of the staff would have felt intimidated or coerced by the style or substance of Mr. Koseck's speech, that might violate the Ethics Ordinance if it was done in the course of conducting official business on behalf of the City. Simply disagreeing with City Staff is not a violation of the Ethics Ordinance. We have previously concluded that city officials have the right to express disagreement with decisions of the City, Advisory Opinion 2004-02, and the City Commission, Advisory Opinion 2007-02. Advocacy, even vigorous advocacy, is

³ The facts of this Advisory Opinion do not involve a board member attempting to vote on the matter for which he was employed. For a situation where a board member had a direct or indirect personal or financial interest which may not have been a conflict of interest see Advisory Opinion 2009-02, where an employee of one hotel who was a member of the Parking Advisory Committee wanted to participate in a matter before that board that affected a competitor hotel.

permitted. Advocacy becomes an ethics violation when the manner of disagreement crosses the line between vigorous advocacy and bullying⁴. In this case Mr. Koseck was acting in his private capacity. He was not acting on behalf of the City. That does not mean that we condone his behavior. We just conclude, similarly to the conclusion we reached in Advisory Opinion 2007-05, that Section 2-321 does not regulate private conduct. It isn't covered by the Ethics Ordinance.

2. Did Mr. Koseck speaking to Mr. Clein and Mr. Emerine conform with the Ethics Ordinance? Mr. Koseck spoke to Mr. Clein and Mr. Emerine, both of whom are professional engineers, about an engineering question. By design, boards have diverse membership. Different boards require different skills. We do not think there is anything improper about one board member asking another about a question within their specialized knowledge. Mr. Koseck believed that this matter would not come before the Planning Board. That belief was incorrect which could have given rise to a conflict of interest amongst himself and Messrs Clein and Emerine. There is no indication that Mr. Clein and Mr. Emerine would not have disclosed the discussion and possibly recused themselves if it did come before the Planning Board. Based on the letters of Mr. Clein and Mr. Emerine, there is no indication that Mr. Koseck lobbied Mr. Clein or Mr. Emerine to take or not take any action should the matter come before the Planning Board. The Request for Advisory Opinion characterizes the conversation as a behind-the-scenes effort to support Mr. Koseck's case, but there is no indication that Mr. Koseck intended to make a behind the scenes deal to get more favorable treatment than would be available to a member of the public, which would have violated Section 2-324(a)(8). Mr. Clein and Mr. Emerine have told us that the conversations were not improper in any way. Just asking a fellow board member for their opinion on a question that is involved in a matter before a City department does not amount to using public employment for private gain, giving or accepting preferential treatment or giving up independence. Sections 2-323(1) and (3). Nor does it violate 2-324(a)(5) unless confidential information is sought or given—not the case here since Mr. Koseck asked for an opinion about engineering matters generally. Mr. Emerine and Mr. Clein weren't asked to give special treatment to Mr. Koseck or his client and they certainly didn't agree to give special consideration to him or his client. Nor does 2-324(b)(2) prohibit any discussion with fellow board members provided that the discussion does not violate the Open Meetings Act. That section requires disclosure of conflicts of interest "on the appropriate record of the city prior to any discussion, voting, or action thereon....."

Board members should be careful not to make commitments to other board members about matters before a city department that might come before their board. Such commitments might compromise a board member's independence or impartiality or constitute partiality, all in violation of Section 2-323.

CONCLUSION

There are obvious and not-so-obvious ethical risks in a Board member representing somebody in seeking an approval from the City. The possibility exists that it could involve using the Board member's status for private gain in violation of 2-323(1) or giving or accepting preferential treatment in violation of 2-323(3) and 2-324(a)(8). The possibility exists that there could be issues with confidential information or with a Board member representing his opinion to be that of the Board's, in violation of the Section 3-

⁴ We have not considered in this matter whether forms of speech or behavior could violate the Ethics Ordinance. This Advisory Opinion should not be understood to say that bullying is the only form of speech or behavior that violates the Ethics Ordinance.

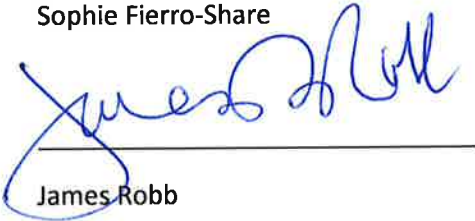
324(a)(2). There are disclosure issues that can arise. Equally important, Board members should be aware that the appearance of an ethical violation can harm the public's confidence in government even if there is no ethics violation in fact.

Board members who choose to take on private work that involves the City must be constantly vigilant to conduct themselves ethically every step of the way. The Board of Ethics appreciates the opportunity to consider these important issues.

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Approved by the Ethics Board this ____ day of July, 2022.



Sophie Fierro-Share



James Robb



John J. Schrot, Jr.