

CITY OF BIRMINGHAM
ETHICS BOARD ADVISORY OPINION
2004 – 01
MAY 4, 2004

The Ethics Board ("Board") received a request from Shelli Weisberg for an advisory opinion regarding the actions of the City of Birmingham Planning Board when approving meeting minutes.

ISSUE

Would it be a violation of the Ethics Ordinance for a member(s) of the Planning Board to knowingly act in contravention of the Open Meetings Act in relation to the drafting, publishing and/or maintaining of its meeting minutes?

OPINION

Yes. The members of the Planning Board are required to conduct Planning Board proceedings, including, but not limited to, the drafting, publishing and/or maintaining of its meeting minutes, in conformity with the Open Meetings Act. This includes the requirement of each meeting's corrected minutes showing both the original entry and the correction. The Planning Board may request further guidance from the City attorney through appropriate channels.

ANALYSIS

Background

Ms. Weisberg, in her request for an advisory opinion, asked the following question:

"Does the following action by the planning board violate the City of Birmingham's Ethics Ordinance Section 2-330 (sic 2-320), Public Policy? Specifically, is this a violation of public trust in that planning board members altered the official record of a meeting because of conflict between their personal interests and the interest of the public?"

Ms. Weisberg represented that in January of 2004 the Birmingham City Commission removed Gary Kulak from the Planning Board. At the January 28, 2004 Planning Board meeting, a member moved to remove from the original draft minutes of the December 10, 2003 meeting certain statements relative to an exchange that took place between City employee James Sabo and Mr. Kulak. The motion passed. City employee Jana Ecker questioned the appropriateness of removing such business from the minutes. Citizen Dorothy Conrad objected (on January 28, 2004 at the Planning Board meeting and on March 2, 2004 at this Board's meeting) to altering the record. Ms. Weisberg stated that given the nature of the then pending lawsuit between Mr. Kulak and the City, it appeared

irresponsible for Planning Board members to attempt to redact this exchange regarding board/employee conduct.

The Planning Board member who moved to strike certain paragraphs from the subject original draft minutes stated that the provisions to be stricken were not germane to the discussion related to the matter before the Board. Another board member concurred in stating that these provisions do not contribute to the minutes, do not deal with the agenda item, and are covered in the videotapes. The Planning Board approved the proposed removal from the minutes in spite of the fact that Mr. Kulak did not participate in the January 28, 2004 vote, and that he had requested that his comments be included in the record.¹ The actions of the Planning Board in deleting such comments and discussion acted contrary to Mr. Kulak's wishes.

City Attorney, Timothy Currier, appeared before this Board at the subject hearing. Mr. Currier reported that the City Commission procedures, charter and/or ordinances do not contain any requirement relative to the procedures for keeping minutes. He explained that Roberts Rules of Order require that only actions taken be recorded in minutes, and that the Planning Board maintains detailed minutes due to the process involving the Board of Zoning Appeals and potential litigation. Mr. Currier noted that Section 9 of the Open Meetings Act specifically requires that final approved minutes must contain the additions or deletions as corrected by the body.² Historically, this procedure has not been followed with regard to Planning Board minutes. After the January 28th Planning Board meeting, the City's planning staff was advised to comply with this requirement.

The Board also reviewed the Planning Board's Rules of Procedure, Article VII of which pertains to its own Code of Ethics. Certain of the statements therein provide that the board members will:

- “3. Abstain from all discussion and decisions in which an appearance of an impropriety or conflict of interest may be perceived. Refuse any personal gift, tangible or intangible that may be perceived as influencing decisions or actions.
4. Continually strive to keep the public informed on community planning issues, encourage communication between citizens and

¹ Pursuant to the Michigan Open Meetings Act (MCL 15.261 et seq.), it provides: “Record,” for purposes of determining what constitutes part of the public record under Open Meetings Act (OMA), means an account in writing or the like preserving the memory or knowledge of facts or events, and information or knowledge preserved in writing or the like. Kitchen v Ferndale City Council (2002) 654 N.W.2d 918, 253 Mich. App. 115.

² Section 9 (1) of the Open Meetings Act provides: “Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. Corrections in the minutes shall be made not later than the next meeting after the meeting to which the minutes refer. Corrected minutes shall be available no later than the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.”

elected and appointed officials, and emphasize at all times friendly, courteous and professional service to the public.

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8. Avoid any act or decision that would tend to promote individual or special interests at the expense and/or dignity of community planning.”
 10. Support and defend the laws and the Constitution of the United States of America and State of Michigan.”

Jurisdiction

Planning Board members are City officials and therefore subject to the Ethics Ordinance. See Section 2-322(I). They have various responsibilities of public office including, without limitation, impartiality and acting within their authority. Section 2-321 further provides in part that: “City officials and employees are bound to observe in their official acts the highest standards of morality and to discharge the duties of their offices faithfully, regardless of personal consideration, recognizing that their conduct in both their official and private affairs should be above reproach.” They are also bound to uphold the Constitution of the State of Michigan and to carry out the laws of the nation, state and city. See Section 2-321.

Section 2-325(B) provides this Board with jurisdiction in this matter. This request for an advisory opinion relates to past conduct. The Board typically issues its advisory opinions to “City officials” concerning prospective conduct. The Board also understands that the issue has been administratively remedied as previously stated. Nevertheless, Ms. Weisberg’s request in this ethical context is deserving of response, and generally addressing same will enhance public trust, provide City officials and employees with adequate guidelines, and proscribe certain actions incompatible with the public interest. See Ethics Ordinance Section 2-320. In addition, it will serve the intention of the Ethics Ordinance “that City officials and employees avoid action, whether or not specifically prohibited by Section 2-3324, which might result in, or create the appearance of:

V. Affecting adversely the confidence of the public or the integrity of the City government. The Code of Ethics is intended to be preventative and not punitive.”

Procedure

The issue as presented by Ms. Weisberg makes a factual statement that there is a conflict, and that such conflict is between the Planning Board member(s)’ personal interest and the interest of the public. The Ethics Ordinance requires full disclosure of any personal interest, in providing in part at Section 2.324.B.I:

"It shall be the responsibility of the official or employee to disclose the full nature and extent of his or her direct or indirect financial or personal interest in a matter before him or her.

No official or employee of the City of Birmingham shall participate, as an agent or representative of the City, in approving, disapproving, voting, abstaining from voting, recommending or otherwise acting upon any matter in which he or she has directly or indirectly a financial or personal interest. The official or employee shall, in such circumstances, recuse himself or herself from the matter before him or her."

Ms. Weisberg did not attend this Board's meeting and discussion thereof, so as to further articulate same. This Board finds that it does not have sufficient information from which to make a determination relative a possible violation. Nevertheless, this Opinion is in response to a request for an advisory opinion, and is not submitted to this Board as a Complaint under the Ethics Ordinance. The two procedures are separate and distinct. Accordingly, for this reason as well, the Board is not addressing at this time the issue of any potential conflict of interest or other violation. Such findings are left to examination only in response to a formal complaint under the Ordinance and Board Procedural Rules with respect to the personal interest issue. Ms. Weisberg is left with that option. In such event, the presentation of evidence may alter an advisory opinion, and therefore for that reason as well no such opinion is being rendered herein. Therefore, the issue as stated by Ms. Weisberg is not appropriately stated and is procedurally deficient according to the Board's Procedural Rules. However, for the reasons stated, the Board sees merit in addressing the substance of the proponent's concern, and thus restated the issue presented. Advisory opinions are intended to be preventative, and for that reason this Board makes recommendation to the Planning Board members as stated herein.

Conclusion

Accordingly, in consideration of the Ethics Ordinance, this Board advises the Planning Board members, that they, and all such City board members, are required to conduct their board meetings in conformity with said Act. Therefore, this Board recommends to the Planning Board that commencing forthwith it draft, publish and maintain its meeting minutes in conformity with the Open Meetings Act. Should the Planning Board desire, it could request further guidance and counsel from the City attorney. In all other aspects of the request for the advisory opinion, and for the reasons stated, the Board declines to act. Anyone is invited to pursue this matter further by filing a complaint under the Board's Procedural Rules.

It is intended that this Opinion generally respond to the request and concern of Ms. Weisberg, and also serve the Planning Board members and other City officials as an effective means of considering whether their actions are consistent with the Ethics Ordinance. Our determination is not necessarily

dispositive of all issues relevant to this situation, but is based solely on the application of the Ethics Ordinance to the facts stated in this Opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter its determination. In addition, Board advisory opinions are narrowly drawn to interpret the Ethics Ordinance. They do not address whether the proposed action is prudent, good public policy or effective management practice. Other laws and rules also may apply to this situation.

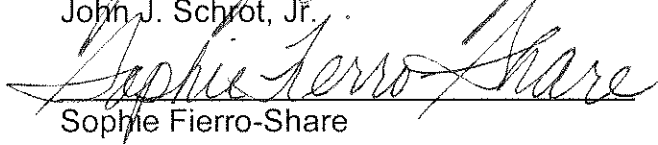
Approved by the Ethics Board this 4th day of May, 2004.



James Robb



John J. Schrot, Jr.



Sophie Fierro-Share