

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION 2006-01**

**DECISION**

**August 17,2006**

**Questions Presented**

Mr. Clinton Baller has requested that the City of Birmingham Board of Ethics issue advisory opinions on two questions concerning members of the city's board of review and the city's assessor's office. His questions suggest substantial concerns about the propriety of the conduct of current or former members of the city's board of review in reducing real property tax assessments on property owned by two of its members and the propriety of the conduct of members of the city's assessor's office in carrying out their assessment duties in 2005 and 2006.

In summary form, the questions Mr. Baller asks are:

(1) Did any members of the March 2005 board of review act unethically in reducing the property values?

(2) Did any members of the Birmingham assessor's office act unethically or inappropriately in advising the March 2005 board of review, or in otherwise carrying out their assessment duties in 2005 and 2006?

**Answer**

The board of ethics holds that it cannot presently decide the questions in Mr. Baller's request because his request, although submitted as a request for an advisory opinion, is in the nature of a complaint against city officials or employees that must be brought and decided according to procedures that cannot adequately be followed without more elaboration from Mr. Baller.

Due to its limited jurisdiction and the scope of its procedural rules, the board of ethics cannot independently investigate the matters Mr. Baller has raised. Instead, the board of ethics may only determine the questions on facts presented to it in the manner found in the board's procedural rules. Those rules provide that the board of ethics can either provide an advisory opinion to a city official or employee about whether his or her own conduct meets the requirements of the city's code of ethics, or the board can act on a citizen's complaint and determine through evidence presented to the board whether the conduct of the city official or employee meets the code. In the latter circumstance, which the board holds is applicable here, the city official or employee whose conduct is being reviewed is called the respondent and is entitled to a statement from the complainant of

why the complainant believes the respondent violated the code of ethics and which section of the code was violated. Moreover, the respondent, as well as the complainant, has certain procedural rights and obligations that follow from the filing of the complaint, including the right to appear at a hearing, call witnesses, and present evidence and argument on the question to be decided.

Although the board of ethics has the discretion to treat Mr. Baller's request for an advisory opinion as a complaint and to proceed in accordance with the rules applicable to complaints, the board in this instance declines to do so because the statements set forth in his request do not identify the respondents and do not give sufficient notice of how and why he believes their actions violated the city's code of ethics. Should he so desire, Mr. Baller is entitled to pursue this matter further as a complaint on the form prescribed by the city clerk and to include in that complaint the necessary details.

### **Analysis and Discussion**

The city of Birmingham enacted its code of ethics through an ordinance adopted on May 19, 2003, and through that ordinance constituted the board of ethics. Ordinance No. 1819 (May 19, 2003), codified at Birmingham City Code, Art. IX, §§ 2-320 to 2-326. Fundamentally, the city has declared through the code of ethics that "all City officials and employees must avoid conflicts between their private interests and the public interest. Public officials and employees must . . . [n]ot use public office for personal gain." *Id.* § 2-320.<sup>1</sup> The code of ethics both prescribes and proscribes certain conduct on the part of city officials and employees.

The function of the board of ethics is to interpret the code of ethics. *Id.* § 2-325(a)(1). "When there is a question or a complaint as to the applicability of any provision of the code of ethics to a particular situation, that question or complaint shall be directed to the board of ethics. It shall then be the function of the board of ethics to conduct hearings and/or issue an advisory opinion, as applicable." *Id.* § 2-325(b). Accordingly, the jurisdiction of the board of ethics is limited to determining whether the conduct of city officials and employees meets the requirements of the code. That jurisdiction does not extend to the more general question of whether city officials or employees acted "ethically." Nor does the board's jurisdiction allow it to act as its own investigative agency. Rather, the board decides its cases based upon the evidence it receives from others at a public hearing held under the applicable rules.

The ordinance directs the board of ethics to "establish such procedures it deems necessary or appropriate to perform its functions as set forth in this article." *Id.* § 2-

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<sup>1</sup> The code defines "city official or employee" as follows: "a person elected, appointed or otherwise serving in any capacity with the City of Birmingham in any position established by the city charter or by city ordinance which involves the exercise of a public power, trust or duty. The term includes all officials and employees of the city, whether or not they receive compensation, including consultants and persons who serve on advisory boards and commissions," but it does not include election inspectors and student representatives appointed to city boards or commissions. *Id.* § 2-322

325(a)(3)(c). The procedural rules established by the board of ethics contemplate three types of matters that can be brought to the board, depending on who is requesting the review and whose conduct is to be reviewed. Each type of matter calls for important but different procedural rights and duties. Because the distinction between two of the three types of matters is relevant to today's decision, a brief discussion of the rules is in order.

The first type of matter that can be brought to the board of ethics is an "advisory opinion" by which a city official or employee, as defined in the ethics ordinance, requests an advisory opinion as to whether his or her own conduct conforms to the code of ethics. *See* Board of Ethics Procedural Rules, Chapter 2 ("Procedure for Obtaining Advisory Opinions") and Rule 201.

The second type of matter is a "complaint" by which any person may bring a complaint against a city official or employee alleging that the official's or employee's conduct is in breach of the code of ethics. *Id.*, Chapter 3 ("Procedure for Resolving Complaints") and Rule 301.

The third type of matter that can be brought to the board of ethics, though not relevant to Mr. Baller's request, is a "referred question" by which the city, its commission, or any city board or committee may refer to the board of ethics the question of whether one of its members is disqualified from discussion, deliberation, action or voting on any pending matter due to a conflict of interest. *Id.*, Chapter 4 ("Procedure for Referred Questions of Disqualification Due to Conflict of Interest") and Rule 401.

As mentioned previously, the type of matter presented to the board of ethics governs the rights and obligations of the various parties.

The request from a city official or employee for an advisory opinion involves a review of his or her own conduct and does not implicate the rights of others. The board of ethics may decide the question based upon that person's written request, with or without his or her personal appearance, and it may receive information from the requesting party or even ask other persons to appear and give information. *See* generally, Board of Ethics Procedural Rules, Chapter 2.

The filing of a complaint, however, involves the conduct of others and implicates their rights. In that instance, the rules of the board of ethics allow certain due process rights to both the complainant and the respondent. The complainant must identify the respondent and state why the respondent is in violation of the code of ethics. The respondent is entitled to be served with a copy of the complaint and to answer it in writing or orally. Both the complainant and the respondent are entitled to appear at the hearing. The complainant has the burden to come forth with evidence to support the complaint and may do so through witnesses and documents.<sup>2</sup> Both the complainant and the respondent may be represented by an attorney. Both may request that the city clerk request others to appear at the hearing. Both may give opening statements, present

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Mr. Baller did not appear at the August 17, 2006 hearing of the board of ethics at which it considered his request.


evidence, and give closing statements, among other rights they have. See generally, Board of Ethics Procedural Rules, Chapter 3.

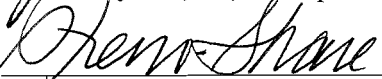
Mr. Baller's request, although styled as a request for an advisory opinion, is in the nature of a complaint because it asks the board of ethics to look into the past conduct of city officials or employees. His request raises general questions about the propriety of actions of members of the board of review in changing assessed valuations of properties owned by two persons who at the time were members of that board, and further about the propriety of certain actions of persons within the assessor's office.


That Mr. Baller's request should more properly be stated in the form of a complaint is not necessarily grounds to decline to decide the matter. Indeed, it is not the policy or practice of the board of ethics to exalt form over substance or to apply its rules in an overly technical way. The board adopted its rules with the intent of realizing the policies and goals set forth in the code of ethics. Board of Ethics Procedural Rules, Rule 101. The rules are to be construed to achieve the timely, efficient and cost-effective determination of matters brought before the board. *Id.*, Rule 102. Furthermore, the board may modify the rules on a case-by-case basis to further this policy. *Id.*, Rule 103. Thus, the board of ethics has the discretion to treat Mr. Baller's request as a complaint and to proceed on that basis.

But in this particular instance, Mr. Baller's request does not specifically identify the individuals whose conduct is to be reviewed, and it does not provide factual allegations and contentions or relate them to violations of the code of ethics sufficiently to allow the board of ethics to determine the matter while affording due process to the respondents.

Accordingly, the board is constrained from proceeding on Mr. Baller's request at this time and declines to act on it. Mr. Baller, should he elect to pursue this matter further, is entitled to submit a complaint on the form provided by the city clerk specifically identifying the individuals he alleges violated the ordinance and explaining how he believes they violated it. Any other citizen may do so, too. Furthermore, to the extent that the city officials or employees involved seek an opinion about whether their conduct conforms to the code of ethics, they may seek an advisory opinion from the board of ethics by filing the appropriate form. In declining to act today on Mr. Baller's request, the board of ethics does not opine on the merits of the underlying assertions.

  
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John J. Schrot, Jr., Chairperson

  
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Sophie Fierro-Share

  
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