

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION 2007-01**

**DECISION**

**January 18, 2007**

**I. INTRODUCTION**

The Birmingham City Commission requested that the City of Birmingham Board of Ethics issue an advisory opinion about whether under the Code of Ethics two candidates for positions on the 2007 Board of Review should not be considered for those positions in light of litigation those candidates have commenced against the State Tax Commission. That litigation arose out of a controversy surrounding the actions of the 2005 Board of Review, of which the candidates were members. On January 11, 2007, the Board of Ethics convened to address the question.

**II. QUESTION PRESENTED AND SHORT ANSWER**

Does the Code of Ethics prohibit the Birmingham City Commission from considering for appointment to the 2007 Board of Review two candidates, Frank Meida and Harold Gottlieb, who served on one panel of the 2005 Board of Review, where (1) their decisions and actions as members of that Board of Review panel in reassessing certain properties, including the property of a member of a different panel of the Board of Review, were, along with actions of the other panel of which City Commissioner Stuart Sherman was a member, found to be inappropriate and reversed by the Michigan State Tax Commission, resulting in a significant change to the assessed valuation of numerous properties in the city, (2) where none of the properties that were reassessed were owned by the two candidates, and (3) where the two candidates and certain other members of the 2005 Board of Review, including Mr. Sherman, have challenged the decision of the State Tax Commission by filing a lawsuit in the Ingham County Circuit Court?

The Board of Ethics answers this question, "No." Stated another way, the Birmingham City Commission may, consistent with the Code of Ethics, consider Messrs. Meida and Gottlieb as candidates for appointment for the 2007 Board of Review, although City Commissioner Stuart Sherman, who served with them on the 2005 Board of Review, may not participate in that consideration.

The Board of Ethics points out that it is not presently considering whether the conduct of the Messrs. Meida and Gottlieb meets the requirements of the Code of Ethics. This we have not been asked to do.

### III. OPINION

#### Statement of Facts

The Board of Review is a statutorily mandated body that considers and acts on protests of property tax assessments on real and personal property. MCL § 211.1 et seq.; City of Birmingham Charter, Chapter III, § 14. Property owners in Birmingham who disagree with the assessment on their property may protest that assessment by submitting a petition to the Board of Review. Board of Review action is required before property owners may appeal further to the Michigan Tax Tribunal.

In Birmingham, the Board of Review is divided into two panels, denoted No. 1 and No. 2. The three members of each of these panels are appointed by the Birmingham City Commission for three-year terms, which are staggered. City of Birmingham Charter, Chapter III, § 14. Each Board of Review panel is separate and distinct in that the members of the two panels do not interchange.<sup>1</sup>

Frank Meida and Harold Gottlieb, along with Leland Fieste, served on Board of Review Panel No. 2 for 2005. Mr. Meida's term on the board expired at the end of 2005. Mr. Gottlieb's term apparently expired in 2006. In all, there are currently three open positions on the board, and the City Commission is scheduled to appoint board members shortly. Messrs. Meida and Gottlieb, among other candidates, have applied for those positions.

During the 2005 tax season, the Board of Review acted on real property tax appeals involving 638 parcels. A public controversy arose when the board lowered the assessments for parcels owned by two of its then members, Guy DiPlacido and Stuart Sherman.<sup>2</sup> Acting through legal counsel, Mr. Sherman had protested his own assessment, and his petition was assigned to Board of Review Panel No. 1, of which he was a member at the time. It appears from the record that Mr. Sherman excused himself from that proceeding. Acting on his petition, Board of Review Panel No. 1 lowered Mr. Sherman's assessment. Mr. DiPlacido had also protested his own assessment. His petition was assigned to Board of Review Panel No. 2, of which he was not a member. As a result of Mr. DiPlacido's protest, Board of Review Panel No. 2 lowered his assessment.

Concerned about the appearance of inappropriate actions by the Board of Review, the City Commission on October 6, 2005 asked the State Tax Commission to investigate. After an investigation, the Tax Commission found that the Board of Review acted inappropriately in the reduction of value for 55 parcels in the city, in that the board either followed sales, which is not sufficient grounds to reduce value, or did not have adequate

---

<sup>1</sup> We refer to the two panels collectively as the Board of Review unless context requires otherwise.

<sup>2</sup> Mr. Sherman has since been elected to the Birmingham City Commission and no longer is a member of the Board of Review.

documentation for the reduction in the value of the parcels. The Tax Commission specifically cited the board's handling of the Sherman and DiPlacido parcels as inappropriate.<sup>3</sup> It ultimately assumed jurisdiction over the entire 2005 city tax roll and, in conjunction with the Oakland County Equalization Department, ordered reassessments on many properties, including increases to the assessments on the Sherman and DiPlacido parcels. Because the 2005 reassessments affected the 2006 assessments, the State Tax Commission also assumed jurisdiction over the 2006 city tax roll.

On September 19, 2006, five of the six members of the 2005 Board of Review, including Messrs. Meida, Gottlieb, and Sherman, filed a lawsuit in Ingham County Circuit Court challenging the actions taken by the State Tax Commission.<sup>4</sup> Among other grounds, the plaintiffs contend that the State Tax Commission had neither the jurisdiction nor sufficient reason to take over the tax rolls as it did. That lawsuit is currently pending. The City Commission has not authorized the suit, and the City of Birmingham is not a party to it. Nor has the city agreed to pay, or evidently even considered whether it would pay, the plaintiffs' legal fees and expense of suit. Success or failure in the lawsuit will not affect Mr. Meida's or Mr. Gottlieb's personal tax bills for 2005, though it will affect the amount of revenue the city receives from taxes on the affected properties.

As might be expected, the matter has generated some attention in the community. Because of the litigation, and given that two of the plaintiffs have applied for board positions that the City Commission must soon fill, the commission directed the City Manager to refer the following question to the Board of Ethics:

The City Commission is seeking an analysis of whether there are any reasons under the Ethics Ordinance why these applicants should not be considered for the 2007 Board of Review positions in light of the litigation.

Letter of Thomas M. Markus to Members of the Birmingham Board of Ethics, at 3 (December 20, 2006). Accordingly, the Board of Ethics looks to the Ethics Ordinance for guidance.

### **Preliminary Matter**

As a preliminary matter, the Board of Ethics received at the beginning of the January 11, 2007 hearing a letter from counsel for the plaintiffs objecting to the form of the request for advisory opinion, complaining that they did not receive either appropriate notice or a command to appear at the meeting, and tacitly requesting an adjournment of the Board of Ethics' meeting and further notice of the proceedings. The letter concluded with the plaintiffs' suggestion that "[a]t the end of the day, it appears that the question

---

<sup>3</sup> The State Tax Commission noted that Mr. Sherman took appropriate steps to excuse himself and have someone else represent him in relation to his protest of the assessment on his parcel.

<sup>4</sup> The case is styled "*In re City of Birmingham Complaint 05-031, Guy DiPlacido, Harold Gottlieb, Frank Meida, Stuart Sherman, and Leon Van Wassenhove, individually and formerly known as The City of Birmingham Boards of Review for the Year 2005, Plaintiffs and Appellants, v. State Tax Commission, Defendant and Appellee,*" docket number 06-1163-AA, pending in the Ingham County Circuit Court.

presented to [the Board of Ethics] is no more than an inappropriate attempt to involve the Board in the political nuances of litigation from which the City has been deliberately omitted as a party defendant.” Letter of Brian D. Figot to City of Birmingham Board of Ethics, at 2 (January 10, 2007). The letter enclosed a copy of a draft of a motion for summary disposition which the plaintiffs evidently intend to file with the court, which Mr. Figot suggested would provide a fuller exposition of the facts, and which the Board received into the record.

The plaintiffs misapprehend the instant proceeding. This matter came to the Board of Ethics as a request for an advisory opinion from the City Commission and was duly docketed, noticed, and conducted pursuant to Chapter 2 of the Procedural Rules of the Board of Ethics. The Board holds that by requesting the advisory opinion in the form and manner it did, the City Commission was seeking a review of whether “its conduct or anticipated conduct conforms to the Code of Ethics.” Board of Ethics Procedural Rules, R. 201. The City Commission did not file a complaint against the members of the Board of Review on the question of whether *their* conduct violated the Code of Ethics. As the “requesting party” under the rules, the City Commission is entitled to receive notice of the meeting of the Board of Ethics directly from the City Clerk. *Id.* R. 203. Plaintiffs were entitled to notice through regular public means, which they obviously received given that their counsel submitted the written materials and one of the plaintiffs appeared personally. Moreover, the Board holds that the request for advisory opinion came to the Board in a form that substantially complies with the requirements of the rules. *Id.* R. 102, 103, 201. Far from being an “inappropriate attempt to involve the Board in the political nuances of litigation,” the request for advisory opinion is a legitimate and substantial request from the City Commission for guidance on how it should conduct itself in municipal governance. Accordingly, plaintiffs’ objection to the form of the request for advisory opinion and to lack of notice is overruled, and their request to adjourn the proceedings is denied.

#### **Analysis of the Request**

As to the merits, the Board of Ethics notes at the outset that the City Commission has the statutory duty to appoint the members of the Board of Review, although the size, composition, and manner of appointment is left to the city. MCL § 211.28(4). The statute, city charter, and city ordinance appear to give no affirmative or negative preference in the appointment process to former members of the Board of Review, and the Board of Ethics was advised of the same by the City Attorney during the January 11, 2007 hearing on this matter. Neither do the former members by any other provision of law have a vested property interest in reappointment. *Attorney General ex rel Rich v. Jochim*, 99 Mich. 358, 58 N.W. 611 (Mich. 1894); *Kulak v. City of Birmingham*, 139 Fed. Appx. 694 (6<sup>th</sup> Cir. 2005) (*per curiam*). Accordingly, Messrs. Meida and Gottlieb have no special right to consideration for the appointment or legitimate expectation that they will receive it.

We next focus on whether the Code of Ethics prohibits the City Commission from considering Messrs. Meida and Gottlieb. We hold that it does not. The City Commission has the full discretion to consider these candidates, as well as any other candidates. In

considering appointments to the city's numerous boards and commissions, the City Commission presumably considers the technical requirements for the position,<sup>5</sup> the reputation, background and experience of the candidates, other relevant characteristics and qualifications of the candidates, and, in the case of someone seeking reappointment, the quality of that candidate's prior work on the board, attendance record, responsiveness to the needs of the citizens and the city, professionalism, demeanor, experience gained in the effort, and generally how well the candidate performed the job in the prior term. The question of whether Messrs. Meida and Gottlieb have violated the Code of Ethics is not presently before the Board of Ethics, but it likewise would be a relevant factor for the City Commission to consider.<sup>6</sup> Thus, with one exception which will be described below, we see no restriction on the City Commission.

Even though Messrs. Meida and Gottlieb are plaintiffs in litigation against the State Tax Commission, that litigation may or may not be adverse to the city. We do note that their counsel has suggested that it could be adverse by stating in his letter to the Board of Ethics that "the City has been deliberately omitted as a *party defendant*" to the litigation. Letter of Brian D. Figot to City of Birmingham Board of Ethics, at 2 (January 10, 2007) (emphasis added). Even assuming that the litigation is adverse to the city, however, we still do not find that the City Commission is barred by the many potentially applicable provisions of the Code of Ethics from considering Messrs. Meida and Gottlieb. Rather, the commission has the discretion to appoint them, or not appoint them, as it deems appropriate.

Moreover, the plain fact that the litigation is adverse to the State Tax Commission does not compel a different result. The State Tax Commission appears to be the body that has ultimate supervisory authority over the Board of Review. Whether the plaintiffs'

---

<sup>5</sup> A Board of Review member must be a freeholder and elector of the city but may not be a City Commission member. City of Birmingham Charter, Chapter III, § 14.

<sup>6</sup> The Board of Ethics is limited to addressing the questions presented to it. Any person who believes that a city official has violated the Code of Ethics may file a complaint in the form prescribed by the City Clerk. Once the complaint is received, the Board of Ethics can act, but the person whose conduct is being challenged is afforded notice and a host of procedural due process rights, as more fully set forth in Chapter 3 of the Procedural Rules of the Board of Ethics. Because no one has filed a complaint against Messrs. Meida and Gottlieb, we cannot decide whether their conduct met the requirements of the code. See *City of Birmingham Board of Ethics Advisory Opinion 2006-01* (August 17, 2006). This is not merely an academic point or procedural formality. Complaints against city officials implicate their rights and require a certain amount of due process. In matter *2006-01*, for instance, the Board of Ethics received a "request for advisory opinion" from a private citizen to answer the question: "Did any members of the March 2005 board of review act unethically in reducing the property values?" We held that request to be unreviewable because it did not sufficiently identify the individuals whose conduct was to be reviewed and did not provide enough factual allegations and contentions and 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 unidentified respondents. *Id.* at 3-4. *Accord, Birmingham Board of Ethics Advisory Opinion 2004-01*, at 4 (May 4, 2004) (request for advisory opinion is distinct from complaint; future practice of Planning Board in how it keeps records may be addressed through advisory opinion, but Board of Ethics reviews third-party allegations that past practice of Planning Board violates Code of Ethics only upon filing of complaint challenging that practice and affording due process to respondents).

claims have merit or even whether plaintiffs have standing to bring the lawsuit remains to be seen; and whether the plaintiffs by bringing suit have breached a conflict of interest rule imposed on them by state law is not before us. Regardless, those issues, yet to be determined by the court or a state agency, if at all, do not place the City Commission itself in a conflict of interest or in a position of undermining public confidence in government. The candidates' litigation against the state may be relevant to the City Commission's consideration of their candidacies, but the litigation does not prevent the City Commission from considering them.

The general public policy provisions of the Code of Ethics require that the City Commission and all city officials be independent, impartial, and responsible to the people; that they make governmental decisions and policy in proper governmental channels; and that they not use public office for personal gain. Code of Ethics, § 2-320. We do not find that these requirements would be violated by the City Commission in its considering the candidates. There may be a question about whether Messrs. Meida and Gottlieb went outside proper governmental channels in bringing the lawsuit against the State Tax Commission; but that question is one for the City Commission in considering the Meida and Gottlieb applications, not one presently for the Board of Ethics

The City Commission and all city officials are bound to uphold and carry out the laws and must not exceed their authority, breach the law, or ask others to do so. *Id.* § 2-321. They shall safeguard public confidence by being honest, fair, and respectful of all persons and property with whom they have contact. *Id.* Furthermore, they must avoid conduct which may tend to undermine respect for city officials and employees and for the city as an institution. *Id.* Again, the conduct of Messrs. Meida and Gottlieb in these respects may be relevant to the City Commission's consideration of their applications, but these provisions do not bar the commission itself from considering them.

Members of the City Commission and all city officials must avoid any action which might result in, or create the appearance of, using public office for private gain, giving or accepting preferential treatment, making a city decision outside of official channels, or affecting adversely the confidence of the public or the integrity of the city government. *Id.* § 2-323. As before, we do not see these provisions violated if the City Commission considers the applications of Messrs. Meida and Gottlieb.

Members of the City Commission and all city officials are forbidden to engage in employment or render service when to do so is incompatible with the discharge of their official duties or when it may tend to impair their independence of judgment or action in performing their official duties. *Id.* § 2-324(6). They may not use their official position to secure any special consideration, privilege, exemption, advantage, contract or preferential treatment beyond that which is available to every other citizen. *Id.* § 2-324(8). We hold that these provisions likewise do not prohibit the City Commission from considering the applications.

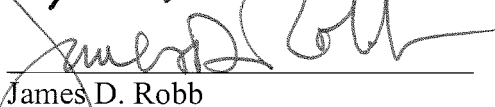
The Code of Ethics recognizes that members of the city's various boards and committees may be placed in the position of participating in a decision that may affect

their financial or personal interests. When in that situation, city officials must act in furtherance of the public good, in compliance with the duties of their respective boards, and without use of their official position to gain a special consideration or preferential treatment. *Id.* § 2-324(8), (9), (10). We believe that the City Commission can consider the Meida and Gottlieb applications consistent with these requirements.

As noted above, we find one exception to the conclusions we have just set forth. Because City Commissioner Stuart Sherman is one of the members of the 2005 Board of Review and is a plaintiff in the litigation, we hold that Mr. Sherman is in a conflict of interest if he participates in consideration of the upcoming appointments to the Board of Review. The State Tax Commission found that the 2005 Board of Review, of which he was a member, acted inappropriately. In the lawsuit, Mr. Sherman argues to the contrary, but so do Messrs. Meida and Gottlieb and for the same reasons. The City Commission's task in filling seats on the 2007 Board of Review could reasonably include evaluating the performance of Messrs. Meida and Gottlieb on the 2005 Board of Review, including their bringing the lawsuit and the resultant effects, and weighing their performance against the applications of the other candidates. In performing this evaluation, Mr. Sherman as a City Commissioner would be called upon to review the quality of the work he himself performed while he served as a member of the same Board of Review. As the United States Supreme Court said in another context, no one may properly be a judge in his own case. *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, Mr. Sherman's participation would not be independent or impartial and would undermine public trust and confidence in the appointment process and the city as an institution. *Id.* §§ 2-320, 2-321, 2-323. We were advised at the January 11, 2007 hearing that Mr. Sherman has indicated that he is recusing himself from the proceedings because he has an attorney-client relationship with Mr. Gottlieb. We hold that he is correct because the Code of Ethics requires him to do so. While Messrs. Meida and Gottlieb are candidates, Mr. Sherman is disqualified from participating in any way in the consideration of any candidate for appointment to the 2007 Board of Review.

In conclusion, the City Commission has the ability, consistent with the Code of Ethics, to consider in its sound discretion the applications of Messrs. Meida and Gottlieb for appointment to the 2007 Board of Review. We do not comment on the conduct of these candidates or on the merits of their candidacies. As we explained in an earlier case, "advisory opinions [of the Board of Ethics] are narrowly drawn to interpret the Ethics Ordinance. They do not address the issue whether the proposed action is prudent, good public policy or effective management practice." *Birmingham Board of Ethics Advisory Opinion 2004-01*, at 5 (May 4, 2004).

  
John J. Schrot, Jr., Chairperson

  
James D. Robb

Sophie Fierro-Share did not participate in this matter.