

**CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2009-02**

**May 4, 2010
As amended July 22, 2010***

I. INTRODUCTION

The Birmingham City Commission requested that the City of Birmingham Board of Ethics¹ issue an Advisory Opinion about whether, under the Code of Ethics, the conduct or anticipated conduct of a member of the City's Traffic and Safety Board conforms to the Ethics Ordinance. On January 22, 2010, the Board of Ethics convened to address the issue.

II. LIMITATIONS OF AN ADVISORY OPINION

An Ethics Advisory Opinion is necessarily limited to the facts presented. The Board of Ethics can only issue advice as to future conduct.

Although this Board's previous opinions/decisions interpreting the Ethics Ordinance are guidance for how we will likely interpret the same provisions in the future, previous opinions/decisions do not govern application of the Ordinance to different facts. Ethics opinions are particularly fact-specific, and anyone wishing to be assured that his or her conduct falls within the permissible scope of the Ethics laws is well-advised to seek an opinion prior to acting and to rely only on an opinion that addresses his or her individual situation. In that regard, to the extent this Opinion states general principles and there are particular fact situations that concern the Commission and the subject City Official, all City Officials are encouraged to contact this Board for specific advice on the application of the Ethics laws to those particular facts.

III. ISSUE PRESENTED AND SHORT ANSWER

Does the Code of Ethics prohibit a "City Official," such as David Wisz of the Traffic and Safety Board, from using one's position on a City Board, or title associated therewith, to advocate a personal political position unrelated to that Board?

*The amendment was made to the second full paragraph on page five of this opinion.

¹ The Board of Ethics was created by the Birmingham City Commission as an advisory body to interpret the Code of Ethics set forth in a City Ordinance. Birmingham Code of Ordinances § 2-325(a)(1). The Board arrives at its opinions and/or decisions upon a vote of the majority of its members after consideration of the evidence in the record and controlling law. Board of Ethics Procedural Rule 216. The Board then sends its advisory opinion to the City Clerk, who will publish and distribute it in conformity with the Ordinance. Board of Ethics Procedural Rule 217.

The Board of Ethics answers this question, "yes;" however it is dependent upon whether the advocacy of the one holding himself out as a City Official is germane to his role as such an Official. Such conduct is only permissible if it is germane to his role as a City Official and if he states that it is his personal opinion and not that of the Traffic and Safety Board or the City.

The Commission's request was for an Advisory Opinion, and this matter does not currently relate to any complaint having been filed against Mr. Wisz. Accordingly, though the Board of Ethics is not presently considering whether the conduct of Mr. Wisz meets the requirements of the Code of Ethics, no request for same has been made to the Board.² The advisory process is especially intended to be preventative, not punitive.

IV. STATEMENT OF FACTS

On December 7, 2009, the Birmingham City Commission requested an Advisory Opinion from the Board of Ethics. The Commission commented upon two documents entitled "Oppose Countywide Bus Tax Increase" and "Oppose Chicago-Detroit/Pontiac Transit Center Boondoggle," both prepared by Mr. David Wisz, a member of the City's Traffic and Safety Board. The signature blocks on the documents read:

Best regards,

David L. Wisz

BIRMINGHAM TRAFFIC AND SAFETY BOARD MEMBER

Intellectual Property Attorney

Birmingham Resident and Business owner

As is evidenced above, the words "Traffic and Safety Board Member" immediately appeared below Mr. Wisz's name and were entirely in capital letters, while the words "Intellectual Property Attorney, Birmingham Resident and Business owner" were predominantly in lower case letters.

At the Commission meeting, it was noted that the Commission had passed a unanimous resolution supporting the countywide transportation system, and that Mr. Wisz's aforesaid conduct, as a member of a City of Birmingham advisory Board, may be appearing to state an official position of that Board and/or the City. The City is non-partisan.

The Commission did not suggest that Mr. Wisz is not entitled to express his opinions, however the question is -- can he do it using his position as an appointed Board member? It does not appear to be disputed that a Board member cannot represent his or her opinion as that of the City or Board that one serves upon, unless it is indeed the City's opinion or that of the Board.

² The Board of Ethics only addresses the specific issues presented to it. An ethics complaint is distinct from a request for an advisory opinion. See Birmingham Board of Ethics Advisory Opinion 2004-01 (May 4, 2004).

Mr. Wisz has served on the Traffic and Safety Board for approximately five (5) months as of the date of the hearing. His term is for three (3) years. The Traffic and Safety Board consists of seven (7) persons. He does not serve on any other Board, and has no prior Board experience with the City. Mr. Wisz explained that the role of the Traffic and Safety Board is to make recommendations to the City Commission for what it sees as beneficial to the City regarding signage and walkability, and to otherwise make recommendations to the City Commission for what it sees as beneficial to the City. Matters come before that Board by City petition. Mr. Wisz further explained that he has a background as an attorney, with his law office within the City, and he is also a precinct delegate.

Mr. Wisz confirmed that he sent the two emails in question, dated on or about October 26, 2009 and December 14, 2009. The emails were sent to political activists regarding a forthcoming Transit Center and countywide tax increase. Mr. Wisz was concerned that there were political motivations from the City or its Officials for support of the Transit Center.

Mr. Wisz acknowledged that the signature block on the subject emails that he prepared was supposed to be all in capital letters, rather than upper and lower case letters and italics. Mr. Wisz did not use any reference to the Traffic and Safety Board in the body of the text of these documents, and the subject matter did not relate thereto. The signature block itself, appears to include true statements. It is recognized that the signature block utilizes the term "member", however that appears to be a distinction without a difference as the words preceding same are "Birmingham Traffic and Safety Board."

According to Mr. Wisz, the emails were also handed out at certain political or informational functions. He stated that he distributed twenty-five or more of these emails at a local function held at a church in Birmingham. Mr. Wisz is not a member of any formal group opposing the Transit Center. He stated that he thought that he was providing his personal opinion therein, and not that of the City or of any Board. The Traffic and Safety Board has not dealt with the issue of the Transit Center.

Mr. Wisz made a submission to the Ethics Board for his own request for an Advisory Opinion as to others' conduct or anticipated conduct, and he included therewith his corporate signature block, which differs from that which he used in the subject emails. He explained that he did not expect the document submitted to this Board to be distributed far and wide like the subject emails.

The City's support for the Transit Center has been well publicized. A study was done in 2007, which the City Commission endorsed. Subsequent thereto, transit matters have been before the Commission many times. The Commission voted unanimously in favor of the SMART countywide tax increase. The Birmingham and City of Troy Planning Boards have met jointly for research on transit oriented development. Both Planning Boards believe that the Transit Center will bring economic development.

Mr. Wisz stated that his conversation with Ms. Ecker of the City of Birmingham led him to send out the emails. He expressed concern that there were political motivations for the support of the Transit Center. Mr. Wisz stated that the purpose of the original emails was to educate people in the cities of Birmingham and Troy. Certain responses Mr. Wisz received from persons who had received the emails were negative towards the City of Birmingham and/or its City Officials as the responses related to "political persecution."³

On a date of the hearing before the Board of Ethics, January 22, 2010, Mr. Wisz was scheduled to speak so as to further his acknowledged "political agenda," where he had been listed on certain documentation associated therewith as a member of the Traffic and Safety Board of the City of Birmingham. Mr. Wisz stated to the Board of Ethics that he would make a disclaimer that he may be a Traffic and Safety Board member, but that the Board has not taken a position on the issue. Mr. Wisz noted that the public is now using his designation/title as a "City Official" and is coupling his political agenda with his position as a City Official.

The City Commission was concerned about the appearance of inappropriate conduct by Mr. Wisz as aforesaid and therefore requested an Advisory Opinion from the Board of Ethics. Accordingly, the matter was docketed, noticed and a hearing conducted pursuant to Chapter 2 of the Procedural Rules of the Board of Ethics. By requesting the Advisory Opinion in the manner and form it did, the City Commission was seeking a review of "whether the conduct or anticipated conduct of the person requesting the opinion, or that of a city official, employee, or body, conforms to the code of ethics." Board of Ethics Procedural Rules, R. 201. The request for Advisory Opinion came to the Board of Ethics in a form that complied with the requirements of the Rules. *Id.* R. 102, 103, 201. The City Commission did not file a complaint against Mr. Wisz on the issue of whether his conduct violated the Code of Ethics. The City Commission's request for guidance on how it and/or Mr. Wisz should conduct themselves in municipal governance is a legitimate and appropriate attempt to address the matter.

V. ANALYSIS AND DISCUSSION

This is not an issue concerning conflict that Mr. Wisz had with the work that he does in association with the Traffic and Safety Board. Furthermore, his signature block provides true information, and there is no falsehood. One may ask, "Can any Board member hold himself/herself out as a member of a City Board?" "Yes," in certain circumstances. In fact, this Board dealt with certain of the issues herein in the Advisory Opinion provided to then Deputy Chief of Police Donald Studt. Ethics Opinion 2003-04, decided February 3, 2004. Therein, the Deputy Chief requested an Advisory Opinion regarding whether he, as a City employee, may run for political office on a non-partisan judicial ballot during non-compensated time. In that Opinion, it was stated that "(t)he Ethic Ordinance clearly prohibits all City employees from using public office for private

³ The Board of Ethics finds that neither the statements made by Ms. Ecker and/or Mr. Moore, or otherwise, provide support to Mr. Wisz's argument that the request for this Advisory Opinion is politically motivated and/or that the City Commission is essentially attempting to impose a gag rule on political opposition.

gain. Section 2-320 and 2-323 (I). Further, the Ethics Ordinance requires all City employees to be non-partisan in all their official acts. Section 2-321. Clearly, Deputy Chief Studt is a City employee. Section 2-322 (I). The Ethics Ordinance defines private gain as "any interest or benefit" a City employee receives. Section 2-322 (7). A benefit need not be monetary to fall within the terms of the Ethics Ordinance. A City employee running for public office could receive one or more benefits during a campaign. It appears to this Board, that a City employee can be a candidate for public office and comply with the Ethics Ordinance if care is taken to avoid specific conflicts of interest."

The Opinion went on to state as follows:

Section 2-324 (A) (VIII) states that "a City employee may not use his official position to obtain advantages not available to all citizens. This Section of the Ethics Ordinance prohibits any City employee who is a candidate for office from using City vehicles or other City property in campaign promotional material or appearing in uniform at any campaign event." Therefore, it is certainly permissible, and not unusual, for a City Official to identify his or her qualifications and City Position in certain circumstances, such as in resumes, biographies or other documents that describe an individual's qualifications in an area of practice. The public has the right to know one's qualifications. Nothing in this Opinion is intended to prohibit same. Caution must be taken however when one's conduct gives the appearance as a "City Official" that his or her opinion is that of the City itself or its Board(s).

In this case, the Traffic and Safety Board would probably not have specific involvement with the Transit Center. Therefore, the apparent emphasis of Mr. Wisz on his Traffic and Safety Board membership may appear to be, but is not, germane to the Transit Center dispute. The Transit Center is a matter that was subject to public conflict and discussion, including Mr. Wisz's communications, but the Transit Center did not involve the Traffic and Safety Board. The ethical difficulty and concern relates to a situation where a private citizen opts to also become a "City Official" and therefore "wears two hats." Someone in such position has to be careful about creating a false impression, such as that one is speaking on behalf of the City itself.

The Board of Ethics is, of course, mandated to recognizing and adhering to the principles of the First Amendment.⁴ This Board dealt with certain First Amendment issues in its decision of June 8, 2004 (Complaint 2004-02), when it addressed the Complaint against Mr. Ralph L. Seger, Jr. In that case, the Board found that a volunteer member of a City board may advocate on behalf of a person who has brought a lawsuit against the City and certain of its officials and may solicit the donation of funds for the purpose of defraying the expense of that lawsuit; however, a volunteer member of the City board may not, consistent with the Ethics Ordinance, be the signatory to, or a fiduciary of, a bank account, the use of which is dedicated solely to funding another person's lawsuit against the City. When one becomes a signatory to, or fiduciary of,

⁴ As an adjudicative body, the Board of Ethics is compelled to consider controlling legal principles. Section 2-323 of the Code of Ethics provides that the Ordinance "should not be construed to interfere with, or abrogate, in any way the provisions of any federal or state statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement."

such an account, that person assumes a role directly against the interests of the City. Such conduct presents an irreconcilable conflict of interest, may tend to undermine respect for City Officials and employees and for the City as an institution, might result and/or create an appearance of adversely affecting the confidence of the public or the integrity of the City government, and is incompatible and in conflict with the discharge of the volunteer's official duties.

Another Advisory Opinion of the Board of Ethics is also relevant to this discussion. On March 22, 2007, this Board decided, in a matter involving Mr. Terence Gates (Advisory Opinion 2007-02), that he, as a member of the Parks and Recreation Board, may express disagreement with the decision of the City Commission on a matter that came before the Parks and Recreation Board without violating the Ethics Ordinance's requirement that City Officials not take actions which adversely affect the confidence of the public in the integrity of City government. Mr. Gates was, in part, concerned about a dilemma he had, caused by Section 2-323 (V) of the City's Ethics Ordinance, which provided that City Officials should avoid any action which might result in, or create, the appearance of affecting adversely the confidence of the public or the integrity of the City government. This Board stated in part that: "Birmingham's municipal government depends upon knowledgeable citizens of diverse backgrounds volunteering for service on City Boards. The Ethics Ordinance encourages them to act independently. Ethics Ordinance Section 2-323 (III). It is perfectly proper for Mr. Gates to express his opinions on matters that come before the Parks and Recreation Board, at the Board or even, as he did, to the City Commission. Nothing in the Ethics Ordinance says otherwise. . . If City officials cannot express opinion, debate the merits of those opinions and vote their consciences, the quality of our City's democracy would be significantly impaired."

In addition, this Board previously conducted a constitutional analysis of the Code of Ethics and applied same to a Birmingham City Official's political activities. This occurred in the January 31, 2008 Decision on Complaint (2007-05) involving a complaint against Mr. Christopher Longe, a member of the City's Architectural Review Committee. In addressing same, this Board stated in part that:

As noted, this is not the first time the Board of Ethics has been called upon to determine whether political activities of city officials violate provisions of the code of ethics. The first matter indeed involved the previously mentioned complaint brought by Ms. Conrad against Mr. Ralph Seger, Jr. That complaint arose out of Mr. Seger's activities to support another public official who had commenced litigation against the city. Decision on Complaint 2004-02, at 1, 7-8 (June 8, 2004). One of our holdings in that case was that Mr. Seger's political speech activities were protected by First Amendment principles. In our opinion, we noted:

the freedom of speech embodied in the First Amendments to the U.S. Constitution and the Michigan Constitution enjoys important stature in

American society. It is 'the indispensable condition of nearly every form of freedom.' *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937) (Cardozo, J.).

Id. at 7. We also held in *Seeger* that, even to the extent that governmental employees may sometimes be validly prohibited from participating in political campaigns, Birmingham's code of ethics is not sufficiently clear and narrow so as to withstand constitutional scrutiny, even if that were the intent of the city. *Id.* at 8. Furthermore, it does not appear to us that the city intends the code of ethics to prohibit political activity.

* * *

Mr. Longe's actions in forming a political action committee and through it taking a position against the candidacies of Messrs. Chafetz and Dilgard for city commission amounts to nearly pure political speech. The Board of Ethics thus finds that, under the facts presented to it, Mr. Longe had every right to take the actions he did and that those actions are protected under the First Amendments to the U.S. and Michigan Constitutions.

* * *

Absent highly unusual circumstances not present here, the Board of Ethics will not prescribe the tone, style, or content of a political campaign. To do so would be repugnant to the Constitution.

In the instant case, the Ethics Ordinance sections that are most relevant are 2-320, 2-321, 2-323 and 2-324. A brief comment as to each follows.

Section 2-320

The Ethics Ordinance provides that public office is a public trust. Birmingham Code of Ordinances, § 2-320. The Code of Ethics is intended to "provide public officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants." *Id.* § 2-320. The Ethics Ordinance requires City Officials, as defined in § 2-322, to avoid conflicts between their private interest and the public interest. City Officials are fiduciaries, and their positions are held in public trust. City Officials must not use their public office for personal gain. *Id.* § 2-320(3). In Mr. Wisz's subject signature block, the emphasis was on the Birmingham Traffic and Safety Board over any other item listed in the signature block. Such over-emphasis could create the appearance of Mr. Wisz speaking on behalf of the City.

Section 2-321

Section 2-321 mandates that all City Officials protect public confidence by being honest, fair and respectful. In addition, City Officials must maintain non-partisanship in all official acts, and avoid conduct which may tend to undermine respect for City Officials and/or the City as an institution.

Section 2-323



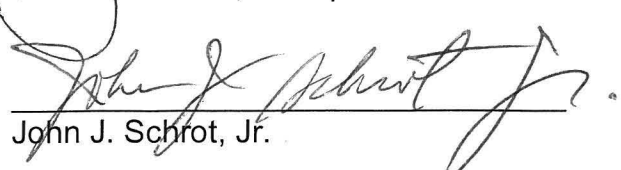
Section 2-323 discusses the intention of the Code of Ethics by providing that City Officials avoid any action which might result in, or create the appearance of, such things as using public office for private gain, or affecting adversely the confidence of the public or the integrity of the City government. This Section also makes it clear that the Code of Ethics is not intended to be punitive, but rather preventative. In this regard, the Code should not be interpreted to in any way interfere with, or abrogate, any statute, ordinance, City Charter and/or rights or remedies.

Section 2-324

Section 2-324 is the specific conflict of interest provision of the Code. Subsection 2 thereof provides in pertinent part that "no official or employee of the city shall represent his or her personal opinion as that of the city." Subsection 8 thereof provides in part that no official shall use or attempt to use his or her official position to secure any advantage for himself, herself or others beyond that which is available to every other citizen.

VI. CONCLUSION

Accordingly, this Opinion celebrates the rights of free speech, but also addresses the self-imposed limitations thereof when one voluntarily elects to become a City Official. When one serves in the public sector, one becomes less and less a "public citizen" and more and more a "public servant." This is part of the responsibilities and burdens one accepts as a public official. Being a public servant may constrain one's activities in many ways, including the open expression of personal views. Having the right to engage in an activity doesn't mean exercising that right is necessarily the best course of action. Whether or how a City Official uses his or her title is an important issue. The Board of Ethics was pleased to address same.


James D. Robb, Chairperson
Sophie Fierro – Share
John J. Schrot, Jr.