

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
ADVISORY OPINION 2015-06**

**DECISION  
DECEMBER 1, 2015**

**QUESTION PRESENTED**

Are Commissioners or other City board members required to recuse themselves due to a non-current conflict of interest? For example, does a previous business relationship or personal relationship constitute a conflict of interest within the meaning of the Ethics Ordinance?

**ANSWER**

No; unless the Commissioner or board member is unable to act impartially or, after disclosure, other board members conclude that recusal is necessary.

**ANALYSIS AND DISCUSSION**

The Ethics Ordinance prohibits an individual from participating in a matter where s/he has a personal financial interest.

Section 2-324 (b)(1) "No official or employee of the city 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."

Section 2-322: "Financial interest means any interest in money, property or thing of value or benefit. Personal interest means an interest arising from blood or marriage relationship or any business association"

In the Ethics Ordinance the word "has" denotes a current relationship. "Has" is the third person singular form of the verb "to have" which the Ethics Ordinance uses in the sense of "to stand in a certain relationship to" (Webster's Seventh New Collegiate Dictionary). By using only "has" and not "had", the Ethics Ordinance regulates only current and not prior relationships.

The Ethics Ordinance recognizes the citizens who volunteer for public service inevitably have a wide range of business and personal relationships that benefit the City. Some of those relationships are acceptable, Sections 2-324(a) (6) para 2 and 2-324(a)(9), and some are not Section 2-324(b)(1). In fact the city's scheme of government takes advantage of the expertise of the citizenry. Board members can participate in a decision where they act in furtherance of the public good, in compliance with the duties of their respective boards and consistent with the requirements of the Ethics Ordinance. Section 2-324(a)(9)(a-c). A key determinant is whether the Commissioner or board member is impartial. Section 2-324 (a) (6): "No official or employee of the city shall engage in or accept employment or render services for any private or public interest when the employment or service is incompatible or in conflict with independence of judgment or action in the performance of his or her official duties".

The Ethics Ordinance relies on voluntary disclosure to help identify the difference between relationships which require recusal and those which do not. Section 2-324 (b) (1) "Responsibility to disclose. 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". In the process of this disclosure care should be taken to avoid improperly influencing fellow board members on the substance of the issue. For example, a board member should state that he/she has a conflict of interest because applicant is a client of his/her firm but not describe how big or small the client is or express any opinion about the applicant at all.

Once disclosed, the Ethics Ordinance does not have a process to determine which relationships require recusal and which do not. This may lead Commissioners or board members to recuse themselves when it is not necessary, thus depriving the public of the benefit of the recused member's judgment.

While the Ethics Ordinance does not specify a process for determining whether a particular relationship requires recusal there are ethical best practices that provide guidance:

First, Commissioners and board members should review the agenda and decide whether there is an item that implicates the Ethics Ordinance, either because of the nature of the item or the identity of the interested parties. Then, the Commissioner or board member should determine if it is a current or a former relationship. If it is a

current relationship that involves personal or financial interest, the Commissioner or board member must recuse him or herself. If it is a prior relationship, the Commissioner or board member should decide if s/he can impartially participate in deciding. If the Commissioner cannot be impartial, s/he should disclose the relationship at the public meeting before any substantive discussion, explain the nature of the relationship and the reason for his or her decision and recuse him or herself. If they feel they can be impartial then they must disclose the relationship to the Commission or board at a public meeting before any substantive discussion on the issue and explain why recusal is not necessary. The other members of the Commission or board may nonetheless determine that recusal is necessary to carry out the letter or intent of the Ethics Ordinance. Each board can determine for itself whether a majority or some lesser vote is required for recusal.

The Ethics Ordinance contemplates the possibility that there may be a disagreement about whether a conflict of interest exists after a disclosure. If a board member makes a disclosure and takes part in the discussion and or vote, and another board member thinks a conflict of interest exists, the matter should be reported to the Ethics Committee.

Sec. 2-324 (b) (2) (b) “if a city official, commissioner or employee who has a conflict of interest, as defined herein, in any matter before the city, and who discloses that conflict on the appropriate records but who refuses to refrain from discussion, deliberation or voting thereon, the matter under consideration shall be immediately referred to the board of ethics for a final determination as to the conflict in question and whether the official, commissioner or employee must refrain from discussion, deliberation, action or voting thereon.”

If there is any doubt about whether a particular relationship requires disclosure or recusal, a Commissioner or member of a board should seek the advice of the board liaison or City Manager prior to the meeting. The City Manager may choose to consult the City Attorney.

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