

CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2018-02

QUESTIONS PRESENTED

1. Does a conflict of interest exist under the City of Birmingham's Ethics Ordinance if a City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as an employee in any business that would be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of the official's governmental duties?
2. Is it a violation of the Ethics Ordinance for a City Official to participate in a decision that may directly or indirectly affect his or her financial or personal interests provided that they act, in furtherance of the public good, in compliance with the duties of his or her respective board, and in a manner consistent with no use or attempted use of official position to obtain or provide special consideration or advantage?
3. Should a City Official participate, as a representative of the City, in any discussion or vote and/or other action upon any matter in which he or she has directly or indirectly a financial or personal interest?

SUMMARY OF ANSWERS

1. Affirmative.
2. Negative.
3. It depends upon the circumstances.

PROCEDURAL HISTORY

The City of Birmingham (the "City") has declared that public office is a public trust. For a government to operate properly, each City Official must honor and earn the public trust by conduct and integrity. All City Officials must avoid conflicts between private interest and public interest and must not use public office for personal gain. Through the Ethics Ordinance, the City has established minimum rules or standards of ethical conduct for City Officials and has designed a process for determining whether their conduct conforms to or violates the ordinance. That process contemplates the involvement of all citizens in monitoring the integrity of City government. When there is a question or a complaint as to the applicability of any provision of the Ethics Ordinance to a particular situation, the City directs that question or complaint to the Board of Ethics. The Board of Ethics may conduct hearings and issue advisory opinions as applicable under the ordinance.

On May 11, 2018 the City of Birmingham City Clerk's office received an Ethics Incident/Complaint from David Hohendorf, publisher of Downtown Publications, in relation to Steven Kalczynski, a member of the City's Advisory Parking Committee and also an employee of the Townsend Hotel. On May 31, 2018, Mr. Kalczynski filed with the City Clerk's office a response thereto.

On Tuesday, June 19, 2018, the City's Board of Ethics convened to conduct a public hearing in relation to the subject Complaint. During the course of the hearing, Mr. Hohendorf expressed that he was not looking for the imposition of any sanction upon Mr. Kalczynski for a possible past violation of the Code of Ethics (the "Code" or "Ethics Ordinance"). As expressed in his Complaint, Mr. Hohendorf was concerned about Mr. Kalczynski's future participation before the Advisory Parking Committee under certain circumstances. After further discussion, Mr. Hohendorf elected to dismiss his Ethics Complaint, along with the request of Mr. Kalczynski to the Board of Ethics for an "advisory opinion" in association with the incident and situation at hand. See Section 2-325(b)¹ and Chapter 2 of the Board of Ethics Procedural Rules. The Board granted the dismissal of the Complaint, and accepted a modification of the matter to one of a request for an advisory opinion. Pursuant to Section 2-325(a)(3)(c) this Board may establish such procedures it deems necessary or appropriate to perform its functions as set forth in the Code.

STATEMENT OF FACTS

Steven Kalczynski is a resident of the City of Birmingham, and at all times pertinent hereto was employed as the Managing Director of the Townsend Hotel (the "Townsend") in Birmingham, Michigan. Mr. Kalczynski does not have an ownership interest in the Townsend.

Mr. Kalczynski serves on the City's Advisory Parking Committee ("APC"), and his term expires on September 4, 2020. He is the designated representative of large retailers in downtown Birmingham, as each of the members of the APC bear a specific designation.

The subject matter was before the APC in association with the Daxton Hotel's request for a permit to construct a 5-story hotel with two underground levels of private parking. The plans previously received Community Impact Study and Preliminary Site Plan approval from the City's Planning Board. As a condition of such approval, the Planning Board requested the applicant to appear before the APC to receive a recommendation relative to the removal of on-street parking, as proposed in their plan.

On or about August 2, 2017, the APC conducted a meeting to consider whether to recommend for approval the removal of eight on-street parking spaces at 298 S. Old Woodward for operation of a valet service, as requested by the owners of the new proposed Daxton Hotel. During the meeting, an attorney for the Daxton Hotel "wanted to ensure there is no conflict of interest with respect to Mr. Kalczynski being the manager of the Townsend Hotel." Mr. Kalczynski did not believe there was a conflict of interest regarding a vote as to whether changes should be made to the parking space arrangements near the Daxton Hotel. The APC Chairman

¹ All references to "Section" relate to the City's Ethics Ordinance.

responded to counsel indicating the nature of the APC is that it is comprised of stakeholders, and that Mr. Kalczynski provides insight into situations that the committee would not have otherwise. No member of the APC raised the issue of a potential conflict, and no vote was taken as to recusal and/or disqualification.

Mr. Kalczynski responded that "he does not have a conflict of interest, that his role in the APC is only to approve or disapprove recommendations for parking, and that he will not recuse himself from the consideration of this matter." Mr. Kalczynski maintains he did not have a conflict of interest because he did not have a financial interest or personal interest in removal of parking spaces. He further maintains that he has no conflict because he holds no ownership interest in the Townsend Hotel, but is merely an employee. He also asserts that even if he had a personal or financial interest he did not have a conflict of interest under the Code because he acted within the public interest. He stated that he believed that removing additional street level parking spaces is not in the public's best interest because street parking in that particular area is extremely limited. He stated that he was acting within the scope of his duties and did not attempt to use his position to secure or grant himself any benefits as a result of his vote.

The applicant was requesting removal of existing parking spaces to create a permanent valet service at the front door of the new building on S. Old Woodward Avenue. It was noted that there is precedent in the city for removing parking spaces for valet. The Townsend itself pays a fee for the former meters and uses 7 parking spaces along Merrill Street. The APC was being asked to similarly remove 8 spaces. Mr. Kalczynski expressed concern relative to delivery trucks seeking to unload on Brown Street and in light of there only being one traffic lane, and considering traffic flow and parking intertwined. Nevertheless, the Traffic Management Plan was reviewed by the City's Traffic Engineer and he signed off, as did the Planning Board. The Plan provides for valet at the front door. As for the loading situation on Brown Street, trucks will back up into a driveway and be off the road and be able to use that area for loading and unloading.

At the APC meeting, committee member Ms. Champagne moved the recommendation for approval of removal of the eight on-street parking spaces to allow for the operation of a valet service by the property owner, in exchange for an annual payment of \$24,000.00 (@ \$3,000.00 per meter) to be charged annually once the Daxton Hotel is open for business. She noted that one of the things that makes the Townsend special in the city is the valet in front. The motion carried 5 -1, with the only "nay," being that of Mr. Kalczynski.

Mr. Hohendorf maintained in his Complaint that the City's approval of the Daxton Hotel had a direct impact on the Townsend, and that Mr. Kalczynski should have recused himself from participation in any deliberations and subsequent voting on issues relating to the Daxton Hotel. Mr. Kalczynski responded that his aforesaid vote was made with the public's interest at heart, that the limited parking is of grave concern for the citizens, and that there is a substantial waiting list for monthly parking permits in the City's parking structures and lots. He reported that even after the APC vote to recommend to approve the plan, the City Commissioners agreed with his position and voted to send the issue back to the Planning Board for further study. Mr. Hohendorf is concerned that the issue of parking at the Daxton Hotel could in the future result in further considerations, deliberations and/or voting before the APC, and he maintains that in such an

instance that Mr. Kalczynski must recuse himself as he has a conflict of interest. Both gentlemen cite and rely upon Section 2-324 of the Code. This Board is aware of a perception by some of a hotel battle brewing between the Townsend and the Daxton.

JURISDICTION

In light of the aforesaid procedural history, this Board will consider this matter as a request for an advisory opinion by Mr. Kalczynski pertaining to his conduct or anticipated conduct, and its conformance to the Code.

Unquestionably, Mr. Kalczynski is a "City Official," pursuant to Section 2-322 of the Code, in that he is a person who has been appointed and serving in a capacity with the City in a position established by City Charter or by City Ordinance which involves the exercise of a public power, trust or duty. He serves on an advisory board, the APC.

Accordingly, pursuant to Section 2-325(b), this Board has the authority to issue the requested advisory opinion.

APPLICATION OF THE CODE OF ETHICS

Both Messrs. Hohendorf and Kalczynski cite and rely upon Section 2-324 of the Code, for their respective positions stated herein. Section 2-323 sets forth the intention of the Code, specifically Section 2-324 which pertains to conflict of interest. Section 2-323 provides in pertinent part that a City Official should avoid any action, whether or not specifically prohibited by Section 2-324, which might result in, or create the appearance of using public office for private gain, giving or accepting preferential treatment, using impartiality of action, or affecting adversely the confidence of the public or the integrity of the city government.

Pursuant to Section 2-324(a)(6), it is noted that an appointed City Official is not prohibited from engaging in private employment or business on his or her own time as a private citizen and/or where city business is not involved, subject to his or her disclosing such private employment or business on the public record before any matter on which he or she may be called upon to act in his or her official capacity. However, it further provides that he or she shall refrain from voting upon or otherwise participating in debate on any such matter in which he or she has directly or indirectly a financial or personal interest. "Official duties" or "official action" means a decision, recommendation, approval, disapproval or other action or failure to act, which involves the use of discretionary authority. Section 2-322.

Section 2-324(a)(8) applies as it provides in part that no official of the City shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration or advantage beyond that which is available to every other citizen.

Mr. Kalczynski in his response, cites and principally relies in support of his position on Section 2-324(a)(9), which provides as follows: "It is recognized that various boards and

committees are part of the plan of government for the city. As such, it is further recognized that by virtue of the various requirements for membership of the board, a member may be placed in the position of participating in a decision that may directly or indirectly affect his or her financial or personal interests. Therefore, those members of the various boards and committees in the city, as they may be established from time to time, may participate in such decisions provided that they act:

- a. In furtherance of the public good;
- b. In compliance with the duties of their respective boards; and
- c. In a manner consistent with subsection (8) of this section.”

Section 2-324(a)(10) pertains to the determination of conflict of interest, and states in pertinent part in subsection a. thereof that a conflict of interest exists if the City Official has any financial or personal interest in the outcome of a matter currently before that City Official or is associated as employee, etc., in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's governmental duties. “Financial interest” means any interest in money, property or thing of value or benefit. Section 2-322. “Personal interest” means, in part, any interest arising from any business association. Section 2-322.

Both Messrs. Hohendorf and Kalczynski cite and rely upon subsection (b) of Section 2.324, pertaining to full disclosure. Section 2-324(b)(1) pertains to the responsibility to disclose, as follows: “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 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.”

Section 2-324(b)(2) pertains to the disclosure of conflict of interest and disqualification, as it provides in pertinent part in subsection (a) 2.: “Any city official or employee who has a conflict of interest, as defined herein, in any matter before the city shall disclose such fact on the appropriate record of the city prior to discussion or action thereon and shall refrain from participating in any discussion, voting or action thereon, as follows, provided that such exceptions shall be observed as are permitted by law: a member of any city board, commission or committee shall disclose any conflict of interest and the nature and extent of such interest on the records of said board, commission or committee.”

Subsection b. of Section 2-324(b)(2) is also informative herein, and it provides that: “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 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 should refrain from discussion, deliberation, action or voting thereon.”

Individuals have multiple roles in their daily lives, and because of same they inherently possess many different interests and loyalties. These interests may compete at any given time. Such conflicts are unavoidable as they are a part of life. As stewards of the public trust, City Officials are required to put the public's interest before their own. Impropriety occurs when the City Official who is faced with conflicting interests puts his or her personal or financial interest in priority to the public interest.

As City Officials have lives outside work, and thus conflicts of interest are likely to exist, if they cannot be avoided they must be disclosed and managed in a planned way. It is important to understand that:

- a. The appearance and perception of a conflict of interest is as important to manage as an actual conflict;
- b. Conflicts of interest are usually personal, and therefore must be managed by the individual involved, however the City has the responsibility for implementing policies, processes and/or systems to assist City Officials to recognize conflicts of interest and deal with them.
- c. City Officials should know the City's conflict of interest ordinance and the Ethics Board procedures, and actively facilitate discussion about how to manage conflicts of interest before they happen and assisting others to manage these as they arise; and
- d. City Officials should feel confident that they can discuss issues of conflict with their colleagues, and that the climate of discussion will be one of assistance and support.

One of the aims of the Ethics Ordinance is to regulate conflict of interest in City government. City Officials are expected to put service to the public ahead of personal interests. The ordinance is intended to prevent officials from making decisions in circumstances that could reasonably be perceived as violating this duty of office. Identifying and resolving conflict of interest situations is crucial to good governance and maintaining trust in City government. Citizens have increasing expectations that government should deliver higher standards of integrity. Conflict of interest should become a significant consideration of those who occupy any position of trust. If conflicts of interest are not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, and government.

Conflicts between private interests and public duties of City Officials must be correctly identified, appropriately managed, and effectively resolved. Left unresolved, conflict of interest can result in corrupt conduct, abuse of public office, misconduct, breach of trust, or unlawful action. Also, public confidence in the integrity of City government can also be seriously damaged. Maintaining trust is a central integrity issue for government and individual officials. Trust can be protected and improved, by making sure that there is no improper connection

between City Officials' functions and their private interests, including the interests of related persons or organizations.

Conflicts of interest interfere with the basic ethical principle of fairness, which is treating everyone the same. A City Official should not take unfair advantage of his or her position by voting on a matter that could benefit him or her at the expense of others. A City Official may honestly believe he or she is not being duly influenced by their personal stake in an issue. To the contrary, he or she may feel that his or her interest in the matter gives him or her a special insight into the subject. He or she may argue that he or she understands the problems of a downtown business because he or she owns or manages one. Nevertheless, it is very difficult for individuals to determine whether they are being fair when their self-interest is involved. Therefore, the Ethics Ordinance prohibits such partiality. The ordinance is aimed at the perception, as well as the reality, that a City Official's personal interests may influence a decision. Even the appearance of impropriety undermines the public's trust that the process is fair. See Sections 2-321 and 2-323.

A City Official is not absolved of his or her responsibility merely by being transparent about his or her stake in the issue. It is insufficient for City Officials to make conflicts public. They must remove themselves from the decision-making process altogether. This includes discussion as well as voting. Abstention is only half of the requirement. For further guidance relative to disclosure and/or recusal, see this Board's Advisory Opinions 2003-03 and 2015-06.

An interest may be personal as well as financial. A personal interest, would especially exist if it improves one's standing in the organization. A personal interest which could constitute a potential conflict of interest situation may include a position held in a business, community or organization. Public office should not be used to punish one's personal and/or political enemies. Rather, City Officials are expected to understand the meaning of the Ethics Ordinance, and comply with same. Every City Official but must be alert to, and responsive to, actual and perceived conflicts of interest. They can avoid or preempt conflicts of interest by understanding and exhibiting the behaviors required of a City Official. City Officials must take personal responsibility for identifying and resolving problem situations. A beneficial discussion and analysis of this topic is set forth in this Board's Advisory Opinion 2012-01.

The presence of a conflict of interest is independent of the occurrence of impropriety. A conflict of interest exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that a decision may be unduly influenced by a secondary interest, and not on whether a particular individual is actually influenced by a secondary interest. "Secondary interest" includes personal benefit and is not limited to only financial gain but also such motives as the desire for professional advancement, or the wish to do favors for others from "an interest arising from blood or marriage relationships or any business association." Section 2-322.

An apparent conflict of interest situation can be as seriously damaging to the public's confidence in a City Official, or the City, as an actual conflict. An apparent conflict of interest should therefore be treated as though it were an actual conflict, until such time as the doubt is removed and the matter is determined, after investigation of all the relevant facts.

City Officials are expected to maintain and strengthen the public's trust and confidence in the City, by demonstrating the highest standards of professional competence, efficiency and effectiveness, upholding the U.S. and State of Michigan Constitutions and laws, and seeking to advance the public good at all times. City Officials are expected to make decisions and act without consideration of their private interests. Public service being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of professional integrity.

The proper objective of the effective conflict of interest policy is not the simple prohibition of all private interests on the part of City Officials, even if such an approach were conceivable. The objective should be to maintain the integrity of official policy and administrative decisions and of City management generally, recognizing that an unresolved conflict of interest may result in abuse of public office.

A too-strict approach to controlling the exercise of private interests may conflict with other rights, or be unworkable or counterproductive in practice, or may deter some people from seeking public office altogether. Therefore, the City's Ethics Ordinance seeks to strike a balance, by identifying risks to the integrity of the City Officials, prohibiting unacceptable forms of conflict, managing conflict situations appropriately, making the City and individual officials aware of the incidence of such conflicts, and insuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations.

An "apparent" conflict of interest exists where it "appears" that a City Official's private interests could improperly influence the performance of his or her duties but this is not in fact the case. A "potential" conflict arises where a City Official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

A City Official should dispose of, or restrict the operation of, personal interests or private gain that could compromise official decisions in which they participate. Where this is not feasible, a City Official should abstain from involvement in official decisions which could be compromised by their personal interests and affiliations, and private gain.

In summary, City Officials are expected to:

- a. Act in a manner that will bear the closest public scrutiny. This obligation is not fully discharged simply by acting within the letter of the law; it also entails respecting broader public service values such as disinterestedness, impartiality and integrity;
- b. Act at all times so that their integrity serves as an example to other City Officials and the public;

- c. Accept responsibility for identifying and resolving conflicts in favor of the public interest when a conflict does arise; and
- d. Demonstrate their commitment to integrity and professionalism through their application of effective conflict of interest policy and practice.

The hearing in the instant case brought to light that there is a need for City Officials and boards to further acquaint themselves with the City's Ethics Ordinance and this Board's Rules of Procedure. So as to further engender an organizational culture which is intolerant of conflicts of interest:

- a. The City should continue to encourage the effective control and management of conflict of interest situations;
- b. The City should continue to encourage City Officials to disclose and discuss conflict of interest matters;
- c. The City should continue to create and sustain a culture of open communication and dialogue concerning integrity and its promotion; and
- d. The City should continue to provide guidance and training to promote understanding of the Ethics Ordinance.

The City has to date worked to ensure understanding of the Ethics Ordinance, including without limitation:

- a. Publicized the Ethics Ordinance, Rules of Procedure, and Opinions;
- b. Ensured that the rules and procedures are available;
- c. Provided guidance with information, advice, and training seminars;
- d. Provided assistance to City Officials who are in doubt about the application of the Ethics Ordinance, and widely publicize how to obtain such advice; and
- e. Identified preventative measures that deal with conflict situations, including recusal.

CONCLUSION

It does not appear that Mr. Kalczynski had or has an "actual" conflict of interest herein. Yet, as evidenced by the filing of the Complaint herein there may have been an "apparent" conflict. Mr. Kalczynski may continue to participate on the APC in discussions and voting in association with the Daxton Hotel project provided that he act in furtherance of the public good, in compliance with his duties to the APC, and consistent with the requirements of the Ethics


Ordinance. He must be impartial. He must also be cognizant of the appearance of a conflict of interest, as well as the public's perception, whether or not specifically prohibited by Section 2-324. The ordinance "is intended to be preventative."

As the ordinance requires voluntary disclosure to assist in identifying the difference between relationships that require recusal and those which do not, he should going forward (a) review the APC agenda and decide whether there is an Ethics Ordinance issue as to any item, (b) if there is a current relationship that involves a personal or financial interest which would constitute an apparent conflict of interest or more, he must recuse himself from participation, (c) if there is a prior relationship, he must decide if he can be impartial, (d) if he cannot be impartial, he must recuse himself, and (e) if he believes he can be impartial, he must disclose the relationship to the APC at the public meeting before participating and explain why recusal is unnecessary. The APC, as a board, can then determine by vote whether his recusal is required. If the vote is not unanimous, the ordinance issue should first be sent to the Board of Ethics for determination.

Approved:



John J. Schrot, Jr.
Acting Chairperson



James D. Robb
Member



Sophie Fierro-Share
Member