

**CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION REQUEST 2019-03**

DECISION

June 19, 2019

I. FINDINGS OF FACT

This case came before the Birmingham Board of Ethics at a hearing held on June 12, 2019. Among others present were Clinton Baller, the complainant, and Joseph Valentine, the respondent, who appeared in person and through his counsel, Michael Sullivan. The facts relevant to disposition of this matter are not in dispute.

Clinton Baller is a resident of the city of Birmingham. Joseph Valentine is the Birmingham City Manager. The complaint surrounds the preparation, letting, and award of a contract to develop a city-owned parcel located in the vicinity of Old Woodward and Bates Street in the heart of Birmingham. The project combines public aspects, particularly a substantial parking structure to replace an outmoded one, with private aspects that include commercial and residential uses. The total cost of the project is estimated to be \$127 million, approximately \$57.4 million of which represents the cost of the parking structure to be built as the first stage of the project. The rest of the project will be developed and constructed in successive stages.

To attract qualified developers, the city prepared and in March 2017 released a request for qualifications (“RFQ”) by which it invited developers to submit their qualifications for submitting a proposal for the site. Following the RFQ, the city selected four entities to submit proposals for the site. It developed and in September 2017 issued a request for proposals (“RFP”). Three of the four entities submitted proposed development plans, one of which later dropped out of consideration. TIR Equities and Woodward Bates Partners were the remaining applicants. Their proposals were submitted to the Birmingham Ad Hoc Parking Development Committee.

The Ad Hoc Parking Development Committee reviewed the submissions and interviewed representatives of TIR Equities and Woodward Bates Partners. After considering the matter, the committee in May 2018 rejected the proposal from TIR Equities, voted to recommend the proposal from Woodward Bates Partners, and referred its recommendation to the Birmingham City Commission for further consideration.

In June 2018, the city commission adopted the recommendation of the Ad Hoc Parking Development Committee. The city then engaged an outside development consultant to help negotiate and finalize the Woodward Bates Partners proposal.

On January 28, 2019, seven months after the city commission rejected its proposal, the rejected bidder, TIR Equities, together with its individual owner filed a complaint in the United States District Court for the Eastern District of Michigan. *Darakjian v. City of Birmingham*, No. 2:19-cv-10277 (E.D. Mich.) (ECF Docket # 1, January 28, 2019). Despite the seven-month period between the city’s action and

commencement of the litigation, plaintiffs alleged “the imminent likelihood of irreparable and permanent harm” and sought injunctive relief, a declaration of rights, and damages. *Id.* ¶¶ 10-12. The named defendants in the lawsuit are Woodward Bates Partners; the City of Birmingham; Birmingham City Commissioner and Birmingham Ad Hoc Parking Development Committee member Mark Nickita; and the Birmingham City Manager, Joseph Valentine, who is the Respondent in the instant matter before the Board of Ethics. Plaintiffs have sued Mr. Valentine in both his official and individual capacities. *Id.* ¶¶ 15-17. The case is at issue, and the defendants have filed motions for judgment on the pleadings. The motion has been briefed by all parties. The Board of Ethics is advised that the federal district court has not set a hearing date for oral argument on the motions.

Among the rationales expressed in their complaint, plaintiffs allege that “[b]y closely involving key members of the selected bidder’s ownership and team in the City’s own private development of the Project itself, of the RFQ, and of the RFP, Defendants ran afoul of [sections 2-324(a)(1) and (8) of the city’s code of ethics].” *Id.* ¶ 32. Plaintiffs allege that the violation of those provisions amounts to a deprivation of their constitutional due process rights under the federal civil rights statute applicable to decisions of state and local governments, 42 U.S.C. § 1983. *Id.* ¶¶ 73, 77. (Plaintiffs’ complaint mistakenly cites variously to “48 U.S.C. § 1983” and “28 U.S.C. § 1983.”)

In response to the city’s and Mr. Valentine’s motion for judgment on the pleadings, plaintiffs took the position that the city and Mr. Valentine permitted a conflict of interest to occur, a conflict which plaintiffs assert “[a]t the very minimum . . . should have been openly disclosed, publicly debated, and transparently addressed by the City.” *See* Plaintiffs’ Response in Opposition to the City Defendants’ Motion for Judgment on the Pleadings, *Darakjian v. City of Birmingham, supra* (ECF docket # 19, April 12, 2019), at 2. In their subsequent reply brief to the court, the city and Mr. Valentine argued that because the ethics ordinance allows an aggrieved person to request an advisory opinion on a claimed ethics violation, plaintiffs should have requested that advisory opinion from the Board of Ethics before the city awarded the development agreement contract to Woodward Bates Partners. *See* Government Defendants’ Reply Brief, *Darakjian v. City of Birmingham, supra* (ECF docket # 21, April 29, 2019), at 7.

On May 10, 2019, less than two weeks after the reply brief of the city and Mr. Valentine was filed in federal court, and relying on the same subsections of the city’s code of ethics as advanced in the litigation, Mr. Baller filed with the Birmingham City Clerk ethics Complaint No. 2019-01 against Mr. Valentine and, collectively, the city’s Ad Hoc Parking Development Committee and the City Commission. Acting under Rules of Procedure 301 and 302, the City Clerk on May 15, 2019 administratively dismissed Complaint No. 2019-01 as to the City Commission and the Ad Hoc Parking Development Committee, determining correctly that the ethics ordinance applies to “city officials and employees” but not to the city commission or any city committee or advisory board as a body. *See* J. Cherilynn Mynsberge Letter to Clinton Baller (May 15, 2019). The next day, Mr. Baller acknowledged the dismissal (*see* Clinton Baller e-mail to Cherilynn Mynsberge (May 16, 2019, 8:45 a.m.)), and he promptly filed a replacement complaint against Mr. Valentine solely, docketed as the instant Complaint No. 2019-03.

As does the federal court litigation in part, Mr. Baller’s complaint to the Board of Ethics now focuses on Mr. Valentine’s role in the development and approval of the RFP.

Specifically, Mr. Baller alleges that Mr. Valentine “approved issuance of the RFP” for the project “that was written with the substantial assistance of architect Victor Saroki and his firm, and then allowed a development group that includes Mr. Saroki and his firm to respond to the RFP.” Complaint, ¶ 2. Although Mr. Baller’s complaint does not specifically allege that Mr. Saroki has any role with the successful bidder, Woodward Bates Partners, the federal court complaint does. (*See Darakjian* complaint, *supra*, ¶ 30). For purposes of this decision, we thus assume without deciding that Mr. Saroki had a role, though we do not opine on the extent of that role.

Mr. Baller asserts generally that Mr. Valentine’s approval of the RFP violated section 2-321 of the ethics ordinance. That section provides in relevant part:

City officials and employees are bound to observe in their official acts the highest standards of morality and to discharge the duties of their offices faithfully, regardless of personal consideration, recognizing that their conduct in both their official and private affairs should be above reproach.

City of Birmingham Code of Ethics, § 2-321. Furthermore, “All city officials and employees shall safeguard public confidence by being honest, fair, and respectful of all persons and property with whom they have contact, by maintaining non-partisanship in all official acts, and by avoiding conduct which may tend to undermine respect for city officials.” *Id.*

Specifically, Mr. Baller also contends that Mr. Valentine’s approval of the RFP violated two parts of section 2-324(a), which provide as follows.

(1) No official or employee of the city shall divulge to any unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.

....

(8) No official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.

Id. § 2-324(a)(1), (8). These are the identical provisions of the code of ethics that plaintiffs in the federal court litigation allege as grounds for recovery of damages from, and equitable relief against, Mr. Valentine.

II. QUESTION PRESENTED

Were we to decide this case on the merits, we might frame the question based upon the complaint as:

Did the Birmingham City Manager violate the city's code of ethics by approving the city's issuance of a request for proposals from developers to develop the Old Woodward and Bates Street project where a member of one of those developers played a role in drafting the request for proposals?

For other reasons, we frame the question as follows:

May the Board of Ethics dismiss a complaint under Rule 302(b) of the procedural rules when a court complaint has been filed against the respondent regarding the same subject matter?

III. ANSWER AND ANALYSIS

Yes. The Board of Ethics may dismiss an ethics complaint that is the subject of another complaint, in this case being a civil complaint filed in United State District Court for the Eastern District of Michigan, regarding the same matter. The applicable rule of procedure provides as follows:

The board may administratively dismiss a complaint for either of the following reasons:

- (i) One or more complaints or requests for advisory opinions regarding the same matter are pending.
- (ii) The board previously addressed the subject matter.

Board of Ethics Procedural Rules, Rule 302(b).

The federal court complaint was the first one filed; the lawsuit began three and one-half months before Mr. Baller filed his complaint with the Board of Ethics. Mr. Baller knew the federal court case was pending because he properly disclosed its existence in his complaint. See Complaint 2019-03, ¶ 4.

Both complaints are against Mr. Valentine, though, of course, the federal court complaint names additional other defendants. Plaintiffs there have sued Mr. Valentine for damages in both his individual and official capacities. Among their theories of liability, plaintiffs specifically assert violations of the same provisions of the ethics ordinance as Mr. Baller asserts in his complaint. We hold that reasons of judicial economy, deference to the court, respect for the monetary and equitable claims pending against Mr. Valentine, timing of the respective complaints, and the need to avoid inconsistent adjudications weigh in favor of dismissal.

Mr. Baller contended at the hearing that Rule 302's reference to "[o]ne or more complaints" means solely complaints filed with the Board of Ethics. We do not read the rule so narrowly. The ethics complaint form issued by the Birmingham City Clerk requires a complainant to disclose other pending complaints by answering the following question:

4. Are you aware of any civil, criminal, or administrative action pending that involves the same parties as alleged in this complaint which involves substantially the same subject matter?

Complaint 2019-03, ¶ 4. We interpret the disclosure requirement of paragraph 4 as evidence that the word “complaint” in Rule 302 means something more than just another complaint pending before the Board of Ethics; to hold otherwise would render meaningless the language of paragraph 4, which calls for the disclosure of civil, criminal or administrative actions, all of which can be commenced with a “complaint.”

Mr. Baller pointed out correctly at the hearing that courts are commonly faced with the prospect of deciding similar cases that could have differing results; therefore, we should decide his case even though the federal case is pending. As an example, he mentioned the several abortion-related lawsuits now pending in various court around the nation. The distinction here, however, is that Mr. Baller brings precisely the same claim against Mr. Valentine as the one brought against Mr. Valentine for damages in federal court. We could anticipate that, one way or the other, our decision on Mr. Baller’s complaint would be used in the federal court case as precedent or as evidence on the question of whether the ethics ordinance was violated. Under the circumstances, we decline to have our decision used that way. To do so would be bad public policy. Moreover, Rule 302(b)(i) answers the question for us. But even if it did not, we have the discretion to stay consideration of the complaint, as neither the ordinance nor the rules specify a time for decision in this type of matter.

Our decision is that we decline to decide the case at this time. We offer no opinion on its merits. Depending on the disposition of the federal court case, there may or may not remain a question for us to consider. Mr. Baller has the right to refile this case at the appropriate time. But that is left for another day.

Accordingly, the Board of Ethics dismisses Complaint 2019-03 without prejudice to Mr. Baller’s right to refile the case either after conclusion of the federal court case, whether that occurs by settlement of all claims, voluntary or involuntary dismissal, entry of judgment and expiration of any right to appeal following judgment, or upon referral directly from the United States District Court to the Board of Ethics for an advisory opinion.


James D. Robb, Chairperson


Sophie Fierro-Share, Member


John J. Schrot, Jr., Member