

**CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION REQUEST 2019-04**

DECISION

June 19, 2019

I. STATEMENT OF FACTS

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; Patricia Bordman, the respondent, who appeared in person and through her counsel, Michael Sullivan; and Joseph Valentine, the Birmingham City Manager, who testified as a witness on certain issues.

Clinton Baller is a resident of the City of Birmingham. He brings this complaint against Patricia Bordman, a Birmingham city commissioner who also serves as mayor by resolution of the Birmingham City Commission. As does the complaint in the related case Mr. Baller filed, No. 2019-03, this complaint surrounds generally the 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 including commercial and residential uses.

The operative facts are not disputed. The city issued a request for qualifications and later a request for proposals from developers to develop the site. The Birmingham Ad Hoc Parking Development Committee reviewed the submitted proposals and recommended to the Birmingham City Commission that Woodward Bates Partners be engaged as the developer. The city commission adopted that recommendation and voted to authorize entry of a development contract with Woodward Bates Partners.

The parking structure, which is a major component of the public portion of the development and constitutes the first stage of the project, is to be financed by unlimited tax general obligation bonds issued by the city. *See* Birmingham N.O.W. Project (North Old Woodward Parking Structure and Bates Street Redevelopment) Frequently Asked Questions, at 4, accessed at [https://www.bhamgov.org/Frequently%20Asked%20Questions%20\(FAQs\)%20N.%20Old%20Woodward%20parking%20and%20site%20development%20060419.pdf](https://www.bhamgov.org/Frequently%20Asked%20Questions%20(FAQs)%20N.%20Old%20Woodward%20parking%20and%20site%20development%20060419.pdf).

The bonds are a method of finance by which the bondholders loan the money to the city. The loan is structured to be repaid by fees generated by parking system. Because the bonds are an unlimited general obligation of the city, the city's residents must approve their issuance in an election. The amount of the loan to be financed by the bonds may not exceed \$57.4 million, which is to be used solely for the construction of the public parking structure and other public improvements. The total cost of this public-private development project is estimated to be about \$127 million.

The development agreement between the city and Woodward Bates Partners provides, among other things, that Woodward Bates Partners will pay the city \$20,000 to defray the cost of the special election to authorize the bonds. As a city commissioner, Mayor Bordman voted with the majority to approve the development agreement. As Mayor, she signed it. Her act of signing the agreement was ministerial—she would be required to sign it even if she had voted against the agreement.

Mr. Baller asserts that by voting for the agreement which includes the payment requirement and then signing the agreement, Mayor Bordman:

has created the appearance that the city has lost complete independence or impartiality of action, and has adversely affected the confidence of the public in the integrity of city government.

Complaint, ¶ 2.

In support of this assertion, Mr. Baller cites portions of section 2-321 of the city's ethics ordinance, which we quote in full:

City officials and employees are bound to uphold the Constitution of the United States and the Constitution of the state and to carry out impartially and comply with the laws of the nation, state, and the city. City officials and employees must not exceed their authority or breach the law or ask others to do so. 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.

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 nonpartisanship in all official acts, and by avoiding conduct which may tend to undermine respect for city officials and employees and for the city as an institution.

City of Birmingham Code of Ethics, § 2-321.

Mr. Baller also cites from section 2-323 of the ordinance, which we quote as follows:

It is the intention of section 2-324 below that city officials and employees avoid any action, whether or not specifically prohibited by section 2-324, which might result in, or create the appearance of:

....

(3) Losing complete independence or impartiality of action;

....

- (5) Affecting adversely the confidence of the public or the integrity of the city government.

Id. § 2-323(3), (5). Mr. Baller's complaint does not allege a violation of section 2-324.

In her sworn written answer to the complaint, Mayor Bordman averred that she has no personal interest in or relationship with Woodward Bates Partners or the entities of which it is comprised, that she had no role in negotiating the city's development agreement with it, and that she made her decisions pertaining to the agreement at meetings that are open to the public. Boardman Answer, ¶¶ 1-5, 7, 8. She stated that the city engaged outside counsel to negotiate the development agreement with Woodward Bates Partners, that the city attorney reviewed the agreement, and that neither counsel advised the city or her that the provision for the developer to defray the cost of the special election was improper or violated any provision of law, including the ethics ordinance. *Id.* ¶¶ 13-21.

Rather, Mayor Bordman stated her belief that the provision requiring Woodward Bates Partners to defray the cost of the special election is beneficial to the city because it reduces the public's expense incurred in holding a special election that is required before the bonds can be issued. *Id.* ¶ 19. Woodward Bates Partners is required to make the payment unconditionally; it is not entitled to a refund regardless of the election's outcome. *Id.*

Mayor Bordman further stated that she has no powers beyond those of the other six city commissioners, that she has no authority to sign the development agreement on behalf of the city without the affirmative vote of the city commission at an open meeting, but that she as mayor is required to sign the agreement as approved by the city commission even if she voted against its authorization. *Id.* ¶¶ 22-24. She averred that the city commission adopted the resolution authorizing the agreement at a duly called commission meeting. *Id.* ¶¶ 25-27. Finally, Mayor Bordman stated that no one on behalf of the city or affiliated with Woodward Bates Partners has tried to influence her decisions regarding the project; but rather, "[a]t all times [she has] considered and will continue to consider the best interests of the City of Birmingham as a whole with regard to all matters, including but not limited to the Project, and without regard to threats against [her], whether veiled or not." *Id.* ¶¶ 32-33.

II. QUESTION PRESENTED

Did the mayor of the City of Birmingham violate the city's code of ethics by voting as a city commissioner to require Woodward Bates Partners, which is a private developer, to contribute funds to support a special election asking the city's voters to authorize the city to issue general obligation bonds that are necessary to finance the public portion of a public-private development project contracted between the city and the developer?

III. ANSWER AND ANALYSIS

No. The mayor of Birmingham and members of the Birmingham City Commission did not violate the code of ethics under the facts as presented in the record. Consistent with law, the city has full discretion to negotiate whatever contractual terms it deems appropriate and in the best interests of the city. The city also has the discretion to schedule the authorizing election at the time best suited for the citizens' needs.

Nothing in the record supports a conclusion that the mayor's vote in favor of the city's development agreement with Woodward Bates Partners in any way violates the ethics ordinance. The agreement was negotiated by the city through outside counsel and reviewed by the city attorney. It was duly approved by the city commission at a public meeting. Mayor Bordman did not participate in negotiating the contract.

The ethics ordinance requires city officials 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. But nothing in the record suggests that Mayor Bordman's vote for, or execution of the, development agreement did anything other than meet this standard.

Similarly, city officials must safeguard public confidence by being honest, fair and respectful of all persons and property with whom they have contact, by maintaining nonpartisanship in all official acts, and by avoiding conduct which may tend to undermine respect for city officials and employees and for the city as an institution. *Id.* Nothing in the record supports a conclusion other than that Mayor Bordman was honest, fair, and nonpartisan and avoided conduct that may tend to undermine respect for city officials and for the city.

Furthermore, city officials must avoid action that might result in, or create the appearance of, losing complete independence or impartiality of action or adversely affect the confidence of the public or the integrity of the city government. *Id.* § 2-323(3), (5). Nothing in the record suggests that Mayor Bordman appeared to have lost any, let alone "complete independence or impartiality of action" or that her conduct called into question the confidence of the public or the integrity of the city government.

Rather, through a technique of exacting benefits from developers that is common among units of government in land development projects, the city's taxpayers received a benefit in that Woodward Bates Partners, the project developer, agreed to pay to help defray the cost of the special election necessary for issuance of the bonds to finance the parking structure and related public improvements within Phase I of the project. Indeed, as counsel for Mayor Bordman argued at the hearing, although Mr. Baller contends that the city should not allow a private developer to pay the cost of the election, other citizens who believe the reverse might have criticized Mayor Bordman had she voted for and signed a contract that did *not* require the developer to pay the cost of the election on what is the core part of the project from which the developer may ultimately profit.

Being the developer, Woodward Bates Partners understandably would hope that the ballot measure passes, for otherwise it might have no project to develop. But nothing in the record even hints that the election itself will be tainted or that the result will be unfairly influenced by the fact that developer is paying some of its cost. For instance, Birmingham City Manager Joseph Valentine affirmed that no portion of the \$20,000 will be used in an advertising campaign to support the election.

No doctrine of law per se bars the development agreement's requirement that the developer contribute toward the cost of the needed election. And development agreements between governmental entities and private developers, as well as governmental land use permits, have commonly contained terms that exact benefits from the developer in favor of the government as a condition of approval for a property development project. Often these are infrastructure improvements or restrictions on land use such as the requirement of a conservation easement, and even the payment of money. The government's power to exact these conditions is of course limited, because excessive conditions can amount to a violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. But it is well-accepted law that a unit of government may condition the approval of a land-use permit or a development agreement on the owner's relinquishment of a portion of his property, or the payment of money, so long as there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 605, 133 S.Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987).

The facts as contained in the record demonstrate a logical nexus between the contractual requirement that Woodward Bates Partners pay to defray the cost of the election and the legal requirement that the city hold the election as a condition of its obtaining the necessary financing. And nothing in the record suggests that the amount the developer is required to pay—\$20,000—is disproportional to the \$54.7 million loan amount for a parking structure that is a key part of an overall development project costing \$127 million.

Finally, city ordinance provides that Mayor Bordman “shall sign . . . all contracts and agreements requiring the assent of the city, unless otherwise provided for by law, the Charter, ordinance or the provisions of this Code.” Birmingham Code of Ordinances, Art. VII, § 2-289. The requirement that she sign the development agreement, once the city commission authorizes it, was imposed upon her by virtue of her office. Her signing the agreement was mandatory and ministerial and fully comported with her obligation under the ethics ordinance “to uphold the Constitution of the United States and the Constitution of the state[,] . . . to comply with the laws of the nation, state, and the city [, and] not breach the law or ask others to do so.” City of Birmingham Code of Ethics, § 2-321. Indeed, Mayor Bordman might have breached the law and violated the ethics ordinance had she not signed the development agreement.

IV. CONCLUSION

The Board of Ethics finds that Mayor Bordman's actions in voting for, and later executing, the city's development agreement with Woodward Bates Partners comport with her obligations under the ethics ordinance. The complaint is dismissed.



James D. Robb, Chairperson



Sophie Fierro-Share, Member



John J. Schrot, Jr., Member