

**CITY OF BIRMINGHAM  
BOARD OF ETHICS  
REQUEST FOR ADVISORY OPINION 2021-01**

**DECISION**

MARCH 15, 2021

**I. STATEMENT OF FACTS**

Mary Kucharek seeks an advisory opinion from the Board of Ethics concerning a potential conflict of interest relative to the exercise of her responsibilities and duties as an official of the City of Birmingham.<sup>1, 2</sup>

Ms. Kucharek is an equity partner with the law offices of Beier Howlett, P.C., a law firm that has represented the City of Birmingham for approximately the past 60 years. She has disclosed a personal relationship with one of the City's consulting engineers, Michael McDonald. Mr. McDonald is a managing partner at the engineering firm of Hubbell Roth Clark (hereinafter "HRC"). HRC has been providing engineering services to the City for at least the past 60 years. Mr. McDonald is a member of the board of directors of HRC, which manages the company. Mr. McDonald oversees the work of Jim Surhigh, who is the primary person responsible for oversight of the work for the City of Birmingham with its engineering needs. HRC is party to a consulting contract with the City, and from time-to-time bids on particular jobs.

HRC's contract with the City is periodically reviewed, and no contract is entered into without the approval and review of the City Commission.

Historically, the law offices of Beier Howlett, P.C. and engineering consultants HRC have worked side-by-side in order to best advise the City on its legal needs and engineering needs. The services of Beier Howlett and HRC have been one of parallel professional relationship. Beier Howlett is not responsible to hire or fire HRC, nor is it responsible for drafting or negotiating a contract with HRC without the direction of the City Manager. Also, Beier Howlett is not responsible for developing any RFP for projects, nor awarding those to HRC. Rather, it is within the purview of the City Manager, with final approval of the City Commission, to engage HRC's services through awarding of contracts or of projects for professional engineering consultation.

Ms. Kucharek and Mr. McDonald subsequent to their dating relationship became engaged to marry as of January 15, 2021. They plan to marry sometime later in 2021. Ms. Kucharek came before this Board to provide full disclosure of her personal relationship with this consulting firm member who also serves the City of Birmingham.

Ms. Kucharek represented to this Board that if at any time HRC's contracts or performance needed to be legally reviewed for the City, she will have another member of the Beier Howlett firm review same so that she is always separated from the contract services associated with HRC. At the hearing before this Board, one of Ms. Kucharek's colleagues at Beier Howlett, Peter Gojcaj, appeared and his qualifications were represented as being sufficient to accomplish same. Beier

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<sup>1</sup> At time of submission of the Request, Ms. Kucharek held the title of Assistant City Attorney, but at present is the City Attorney.

<sup>2</sup> Ms. Kucharek references that the requesting party(s) of this advisory opinion is she and City Manager Thomas Markus.

Howlett attorney Michael Gibbons was also mentioned as a stand-in. Ms. Kucharek represented that Beier Howlett does nothing more than review the HRC contract with the City for form, and does not negotiate with HRC. Should that become necessary, Ms. Kucharek stated that she would not be involved with same, but rather another law office member would do so, in an effort to avoid even in the appearance of impropriety. Ms. Kucharek represented that City Manager Markus was aware of, and comfortable with, her relationship with Mr. McDonald.

## II. DISCUSSION

The Ethics Ordinance of the City of Birmingham is designed in part to "provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants." Ethics Ordinance §2-320.

The ordinance further provides that public officials must:

- (1) Be independent, impartial and responsible to the people;
- (2) Make governmental decisions and policy in the proper governmental channels;
- (3) Not use public office for personal gain.

This section of the ordinance (§2-320) mandates that City officials, such as Ms. Kucharek, must avoid conflicts between their private interests and the public interest. See Decision on Advisory Opinion 2015-05 (Harris). Upon marriage, Ms. Kucharek will have heightened responsibilities in relation to the ordinance as she will thus have "personal interest" and "immediate family" considerations. See §2-322 and Decision on Advisory Opinion 2018-02 (Kalczynski).

Ms. Kucharek correctly acknowledged those responsibilities as in her Request for an Advisory Opinion she cited §2-321-Responsibilities of Public Office in the Ethics Ordinance, as follows: "City officials and employees are bound to observe in their official acts the highest standards of ethical conduct and to discharge the duties of their offices faithfully, regardless of personal consideration, recognizing that their official conduct should be above reproach." See Decision on Advisory Opinion 2012-01 (Nickita).

The Board felt it important in its deliberation of this matter to discuss §2-323 pertaining to the intention of the Code, and specifically the following subsections:

- (2) Giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person;
- (3) Losing complete independence or impartiality of action;
- (4) Making a city decision outside official channels; or
- (5) Affecting adversely the confidence of the public or the integrity of the city government.

The Board further discussed and advised Ms. Kucharek of the following subsections of §2-324(a) pertaining to conflicts of interest, which she should be especially vigilant of:

- (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.
- (4) No official or employee of the city shall directly or indirectly, solicit or accept any gift or loan of money, goods, services or any other thing of value for the benefit of any person or



organization, other than the city, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties.

(5) No official or employee of the city shall engage in a business transaction in which he or she may profit because of his or her official position or authority or benefit financially from confidential information which he or she has obtained or may obtain by reason of such position or authority.

(6) No official or employee of the city shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties.

(7) No official or employee of the city shall participate, as an agent or representative of the city, in the negotiation or execution of contracts, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision, relating to any business entity in which he or she has, directly or indirectly, a financial or personal interest.

(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. See Decision on Complaint 2007-04 (Vandermeer).

While this Board determined that there is no actual or apparent conflict of interest in the instant case, there is the potential for same; and, for that reason it pointed out subsection 10 of 2-324(a) (pertaining to a determination of conflict of interest), which provides that a conflict of interest exists if:

a. The city official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of any matter currently before that city official or employee, or is associated as owner, member, partner, officer, employee, broker or stockholder 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 or employee's governmental duties, or;

b. The city official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity, or;

c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest. See Decision on Advisory Opinions 2018-02 (Kalczynski) and 2009-01 (Vosburgh).

Finally, the Board referenced §2-324(b)(2), pertaining to the disclosure of any conflict of interest and disqualification. See Decision on Advisory Opinion 2012-02 (Valentine).

As a public agency attorney, Ms. Kucharek must meet a number of requirements (including ethics requirements) to be able to practice law and to continue practicing law in Michigan. Certain of those requirements are features of state law, and others are rules adopted by the State Bar of Michigan. She must adhere to the Rules of Professional Conduct set forth by the State Bar of Michigan and approved by the Michigan Supreme Court. These requirements are in addition to ethics law requirements imposed on public officials. As is the case with rules relating to ethics, these are minimum standards. These rules impose a professional obligation for an attorney to counsel compliance with the law. The City's Ethics Ordinance and its principles encourage a municipal lawyer to promote the rule of law and to rely on sound legal analysis in



providing advice. Promoting a culture of ethics and fidelity to the law is every city official's responsibility in public service.

Ms. Kucharek's obligation is to put the public's interest first. The public may question whether her aforesaid personal relationship affects her ability to be objective, however, she appears to have effectively addressed that within the context of her law firm by agreeing to and being able to step aside from certain situations that may generate such an appearance. Ethical issues arise any time the public might reasonably question whether a romantic/marital relationship results in preferential treatment. Professionalism and regard for others dictate that both Ms. Kucharek and her fiancé/husband be discreet about their relationship in their public conduct. This includes treating each other as if the relationship did not exist in professional situations. Further, they should avoid any tensions or arguments in the work environment, as well as refrain from using the City's communication systems for personal communications.

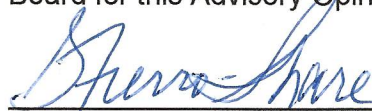
As the City's Ethics Ordinance suggests, public service involves sacrifice. Ms. Kucharek's responsibilities to the City to avoid risks and maintain her objectivity, as well as the perception of objectivity, trump her personal interests. Ms. Kucharek's suggested safeguards should successfully avoid self-dealing and/or the public's perception of same.

### III. CONCLUSION

The Board of Ethics concludes that Ms. Kucharek and Beier Howlett could sufficiently enact enough of a virtual wall between City Attorney Kucharek and other attorneys at the firm who may in the future handle matters on behalf of the City of Birmingham regarding HRC at the discretion and direction of the City Manager. There is precedent in both general legal practice and the City's Board of Ethics Opinions for such an ethical wall being adequate to avoid conflicts of interest that might otherwise arise. Should a particularly adversarial matter arise between the City and HRC, such as one that might result in litigation, the City likely should not be represented by Beier Howlett for that matter, and should retain outside legal representation.

Ms. Kucharek will have a continuing obligation to disclose to the City any potentially emerging conflicts of interest. In order to avoid creating the perception of a conflict of interest, Ms. Kucharek and Mr. McDonald should abstain from any nonprofessional behavior in City-related proceedings, as well as abstaining from the use of any City technology to conduct nonprofessional correspondence with each other.

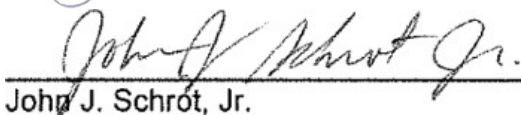
The Board of Ethics commends Ms. Kucharek for having realized that she may have a potential conflict of interest and for bringing it to the Board for this Advisory Opinion.



Sophie Fierro-Share, Chairperson



James D. Robb



John J. Schrot, Jr.