

CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2022-01
SEPTEMBER 22, 2022

I. Introduction.

Birmingham City Manager, Thomas M. Markus, filed a Request for Advisory Opinion (“Request”) with the City of Birmingham Board of Ethics¹ on April 25, 2022 seeking a determination as to whether the recent conduct of a City Official conformed to the Code of Ethics. The subject party referred to by the City Manager is Samuel Oh, who is a member of the Corridor Improvement Authority Triangle District Development Board, a board of the City of Birmingham (“City”). On August 16, 2022, after both requesting party and the subject party respectively requested adjournments of the hearing, the Board of Ethics convened to address the issue on August 16, 2022.

The City Manager’s Request in this matter does not relate to any complaint having been filed against Mr. Oh. Accordingly, the Board of Ethics is not presently considering any allegations that the conduct of Mr. Oh is in breach of the Code of Ethics.² The Code of Ethics is intended to be preventative, not punitive.

II. Issues Presented and Abbreviated Answers

As set forth in Chapter 2 of the Board of Ethics Procedural Rules pertaining to the procedure for obtaining advisory opinions, the ultimate question to be determined by this Board in such instances is: “Whether the requesting party’s conduct or anticipated conduct, or that of a City Official, Employee, Commission, Board or Committee under the requesting party’s authority, conforms to the Code of Ethics?” In the matter at hand, there was and is no dispute that the subject party, Mr. Oh, was and is a “City Official,” and under the City Manager’s inherent authority. The Board of Ethics has determined that certain of Mr. Oh’s conduct has not conformed to the Code of Ethics.

Throughout the hearing, upon the request for an advisory opinion, it became evident that there were two subsidiary questions that needed discussion, analysis and determination. The first of those questions was: “Does the Code of Ethics prohibit a City Official, such as Mr. Oh of the Triangle District Corridor Improvement Authority (TDCIA), from using his position on a City Board, or title associated therewith, to advocate a personal position unrelated to that Board?” The Board of Ethics answers this question in the affirmative. However, one’s use of official position is dependent upon whether the advocacy of the one holding himself out as a City Official is germane

¹ The Board of Ethics was created by the Birmingham City Commission as an advisory body to interpret the Code of Ethics set forth in a City Ordinance. Birmingham Code of Ordinances §2-325(a)(1). The Board arrives at its opinions and/or decisions upon a vote of the majority of its members after consideration of the evidence in the record and controlling law. Board of Ethics Procedural Rule 216. The Board then sends its advisory opinion to the City Clerk, who will publish and distribute it in conformity with the Ordinance. Board of Ethics Procedural Rule 217.

² The Board of Ethics only addresses the specific questions presented to it.

to his or her role as such an Official. Such conduct is only permissible if it is germane to his role as a City Official and if it is abundantly clear that it is his or her personal opinion and not that of the Board (e.g. TDCIA) or the City.

The second question is: "Whether Mr. Oh's dissemination of inaccurate information pertaining to the City, after being advised by City staff as to the accurate facts, was intentional, self-serving, and detrimental to the public's trust in City government?" The Board of Ethics also answers this question affirmatively.

III. Statement of Facts

On March 25, 2022, the City Manager learned that City Official Oh, a member of the TDCIA, hosted on the social media site Change.org a request for a petition to be signed by 100 persons for revision of the Triangle District Master Plan. The City Manager attached to his Request a copy of the petition. Mr. Oh initiated his petition, upon a website he (and/or his wife as he stated) selected, with the words "Samuel Oh started this petition." Mr. Oh thereafter began the petition with the entire first paragraph reading "My name is Samuel Oh and I am a member of the Corridor Improvement Authority (Triangle District Development) board." Mr. Oh is a member of the board, as in part shown by the City Manager of Mr. Oh's Application for City Board, Mr. Oh's Affidavit and Disclosure Statement to the City dated on or about December 21, 2020, (whereupon he subscribed and swore on that date immediately above his signature to the following quoted language: "I have read and understand the Code of Ethics of the City of Birmingham and to the best of my knowledge, I am not in conflict with its provisions."), his Affirmation of Support of the City's Charter and Code of Ordinances (relating to his affirmation that he would support the City's Code of Ordinances in performing the duties of office), and Mr. Oh's attestation before the City Clerk on December 21, 2020 that he would support the U.S. and Michigan Constitutions and endeavor to secure and maintain honest and efficient administration of the affairs of Birmingham, free from partisan distinction or control, and to perform the duties of the office of the Birmingham TDCIA according to the best of his ability.

In the City Manager's Request, he asserted that the Code of Ethics is clear that one is not to use public office for personal gain, and that acting on behalf of the City one does so with the utmost integrity and without even the appearance of impropriety. He expressed his concern with Mr. Oh in using his position as a Board Member to circulate a petition for revision of the Birmingham Triangle Development Master Plan. In addition, the City Manager asserted that Mr. Oh's statements at Change.org were fraught with inaccuracies and therefore a concern to the City, and therefore contrary to certain provisions of the Code of Ethics.

The City Manager was also concerned as to Mr. Oh's content, and/or use of, this social media, and the use of the petition as aforesaid, to sound as though he was acting in an official capacity and performing an official action of the Board. The City Manager noted Mr. Oh's use of his official position with the City in the petition and was concerned that perhaps Mr. Oh, in order to secure and request signatures on his petition, was using his official capacity to advance his personal position and attempt to benefit his own property value(s).

The City Manager also questioned whether Mr. Oh was acting in a way that was not in compliance with his duty to his City board, but instead was utilizing his position to act against the Triangle District Board's Plan, for which Mr. Oh has been sworn to represent and make decisions on behalf of the board.

The City Manager further expressed concerns regarding Mr. Oh's actions at a Planning Board meeting, which was held on March 9, 2022. The City Manager stated that Mr. Oh made comments regarding the process and makeup of the Birmingham TDCIA (of which he is a member) along with potential impacts of rezoning on the neighborhood. The City Manager provided this Board with the Planning Board Minutes of March 9, 2022. The City Manager stated that Mr. Oh made therein multiple erroneous statements of the Board's makeup. The City Manager also attached the City Clerk's Memo to the Manager on March 15, 2022 detailing the correct information regarding the Board and a transcript of Mr. Oh's false or inaccurate statement. This Board of Ethics was also provided by the City Manager with the City Manager's Report offered to the City Commission on March 28, 2022, wherein the Manager stated that he had to "set the record straight" for the City Commission regarding Mr. Oh's misstatements.

In this regard, the City Manager was concerned about Mr. Oh disseminating misinformation to the world, while at the same time the Code of Ethics required Mr. Oh to avoid any action which would affect adversely the confidence of the public or the integrity of the City government.

The City Manager at the hearing before this Board of Ethics presented his position and evidence, further stating in part that he sought an Advisory Opinion. He noted that Mr. Oh is "a fairly new board member, and that while applicants have to sign they have read the City's Code of Ethics, they don't always understand it." He further noted that his opinion came about after "some consternation between Mr. Oh and some City staff. He did not feel he (Mr. Oh) was getting answers he felt he wanted." The Manager asserted that Mr. Oh was informed by City Staff that he was sharing incorrect information, but that Mr. Oh did not change the information he was sharing after receiving the correct information from Staff. The Manager further stated that Staff had conversations with Mr. Oh prior to Mr. Oh's circulating the petition. These conversations sought to clarify Mr. Oh's factual misunderstandings about the TDCIA and the Triangle Plan. Mr. Oh indicated to Staff prior to his circulating his petition that he had a clearer understanding of the concerns relating to the differences of opinions.

The City Manager further stated in part that "The Triangle Plan hasn't changed in the 2040 Master Plan. That was what we were trying to convey as inaccurate." The City Manager additionally stated "The Master Plan is a global process. The Triangle Plan is a zoning plan. It was merely a repetition in the 2040 Master Plan. There is a Triangle Plan that was adopted in 2008. That's when development standards were adopted. There has never been a Triangle District Redevelopment Plan, as noted in the petition."

Testimony was also provided in support of the Request by the City's Planning Director, Nicholas DuPuis, as well as Assistant City Manager, Jana Ecker.

Mr. DuPuis testified in part that he and Mr. Oh engaged in an email exchange whereby Mr. DuPuis attempted to clarify the intent of the 2040 Master Plan in relation to the Triangle District. He stated that when he attempted to clarify the specific misreading made by Mr. Oh of some images contained in the draft 2040 Master Plan, the email exchange became inappropriate and City Manager Markus was notified of the issue. Further, in mid-April 2022, City Staff attempted to address previous misunderstandings about the Triangle Plan at the Joint Commission-Planning Board Meeting.

Assistant City Manager Ecker testified in part that a redevelopment study between 2013-2015 was not about redevelopment per se, but only about how much parking was needed using

TIF money. She stated in part: "It didn't change height standards or ordinances.... saying increases in height and zoning – that is not true. That is already allowed since 2007. He's (Mr. Oh) putting his name as a Board member to give it weight, and all of the information he's putting out is false. He continued to put it out there after being told multiple times it was false."

Mr. Oh challenged the City Manager, Planning Director and Assistant City Manager, repeatedly stating that the City had an "overreach of their interpretation of official documents,". He further testified that he began the Change.org petition stating "My name is Samuel Oh and I am a member of the Corridor Improvement Authority (Triangle District Development) board," as an effort toward full disclosure and that the City had changed their Triangle District Master Plan in the 2040 Master Plan process. He did so despite repeated clarifications from City Staff that it had actually been approved in 2007 and was only reproduced in the 2040 Master Plan process. He testified that he has been a resident of the Triangle District since 2013, and does not own a business in the District.

Mr. Oh also testified in part that he had to listen to "these inaccuracies that I am accused of...what is intent, and what was I representing." He stated in relation to putting his name on the petition that he "was just giving it the perspective of a resident", and that "if I didn't disclose it would build up distrust."

Mr. Oh further testified that even if he had known it was a violation of the Code of Ethics, he still would have used his official title in the petition "because it's unethical not to." Upon further inquiry, Mr. Oh when asked if he was concerned about the purported Master Plan as to why he didn't bring this up with his own board. He stated it was because he believed his interpretation was correct. The Board of Ethics finds that it would have been advisable for him to raise his concerns with the TDCIA, to discuss what the board's priorities were and what should occur.

During the discussion, Board of Ethics member Sophie Fierro-Share voiced with everyone her insight as follows: "Errors are made. Making a mistake isn't unethical. Where it's an issue happens when we're not open to understanding."

Board of Ethics member James Robb pointed out that there have been other situations when officials have been frustrated with other public officials, but they have to get along. Words matter. "As a public official, you have an obligation to make sure that statements of fact are in fact, facts. People see you as an official and maybe you are mistaken on some things you put in your petition, but that can cause mistrust of City Officials by the public." At one point during the hearing, Mr. Oh referred to the City as "the other side." However, he did state at the hearing that he did not intend to represent his opinions as those of the TDCIA or the City. He stated he wrote the petition on behalf of some fellow Triangle District residents after discussion with them, but did not mention that the petition was written on their behalf as he was trying to keep the text of the petition brief.

Mr. Oh submitted three additional documents into evidence at the hearing. The first was a City of Birmingham Resolution Establishing Corridor Improvement Authority and Designation of Development Area dated November 10, 2008. The second is dated March 9, 2022, and was described by Mr. Oh as part of a package he gave to the City Commission. The third was various emails relating to communications between Mr. Oh and Messrs. Markus and DuPuis. This Board found that these documents were supportive of the testimony of City Staff Markus, DuPuis, and Ecker.

Toward the end of the hearing, Mr. Oh expressed some remorse for his aforesaid conduct and some of the language he used in his email exchange with Mr. DuPuis. The City Manager did not file, and has not filed, an Ethics Complaint against Mr. Oh on the issue of whether his conduct violated the Code of Ethics. The City Manager's request for guidance on how he and/or Mr. Oh should conduct themselves in adherence to the Code of Ethics and/or in municipal governance is a legitimate and appropriate attempt to address the matter.

IV. Analysis and Discussion

This is not a matter involving an issue concerning conflict that Mr. Oh had with the work that he does in association with the TDCIA. Mr. Oh is a member of said board, and therefore his statement as to his status as a City Official is not false. This Board of Ethics has previously determined that a Board member may hold himself or herself out as a member of a City Board under certain circumstances.³

The Studt Ethics Opinion stated that "(t)he Ethics Ordinance clearly prohibits all City employees (or officials) from using public office for private gain." Section 2-320 and 2-323(1). It further pointed out that the Code of Ethics defines "private gain" as "any interest or benefit, in any form, received by a City...official." See Section 2-322. The Studt decision recognized that "a benefit need not be monetary to fall within the terms of the Ethics Ordinance." That opinion further cited Section 2-324(a)(8) of the Ordinance, which provides that "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 himself, herself, or others, beyond that which is available to every other citizen." In Mr. Oh's matter, his advocacy had a relationship with personal gain.

The Wisz Ethics Opinion⁴ determined that the use of his official position in that case was not germane to the matter being pursued by the City Official. This Board has found the same in the instant case involving Mr. Oh. As stated in the Wisz Opinion, "(t)he ethical difficulty and concern relates to a situation where a private citizen opts to also become a 'City Official' and therefore 'wears two hats.' Someone in such position has to be careful about creating a false impression, such as that one is speaking on behalf of the City itself." The Ethics complaint opinion relative to Mr. Ralph L. Seger, Jr., being number 2004-02 also has some relevance herein. This Board therein made it clear that it is mandated to recognizing and adhering to the principles of the First Amendment.⁵ However, the First Amendment principles do not permit a member of a City Board to assume a role, and act as a competing fiduciary, directly against the interests of the City. As stated in Wisz, "(s)uch conduct presents an irreconcilable conflict of interest, may tend to undermine respect for City Officials and employees and for the City as an institution, might result and/or create an appearance of adversely affecting the confidence of the public or the integrity of the City government, and is incompatible and in conflict with the discharge of the volunteer's official duties." Herein, Mr. Oh's identification of himself as a TDCIA member at the beginning of

³ See Ethics Opinion 2003-04, decided February 3, 2004, pertaining to then Deputy Chief of Police Donald Studt.

⁴ See Ethics Opinion 2009-02, decided May 4, 2010, pertaining to David Wisz of the Traffic and Safety Board.

⁵ As an adjudicative body, the Board of Ethics is compelled to consider controlling legal principles. Section 2-323 of the Code of Ethics provides that the Ordinance "should not be construed to interfere with, or abrogate, in any way the provisions of any federal or statute statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement."

the petition appears to create confusion for the recipients thereof.⁶ His representation that the use of his official title was intended to assist the public is illogical. Public officials are obligated to be aware that their words could be misinterpreted or misread. Therefore, when making a personal statement that identifies the speaker as a city official that official must include a conspicuous disclaimer that the opinions expressed are his or her personal opinions, and not the opinion(s) of the City or any other City Official.

The foregoing was and is never intended to preclude a City Official from expressing his or her opinions on matters that come before his or her respective board. As stated in part in the matter involving Mr. Terence Gates (Advisory Opinion 2007-02), "Birmingham's municipal government depends upon knowledgeable citizens of diverse backgrounds volunteering for service on City Boards. The Ordinance encourages them to act independently. Ethics Ordinance Section 2-323(III). It is perfectly proper for Mr. Gates to express his opinions on matters that come before the Parks and Recreation Board, at the Board or even, as he did, to the City Commission. Nothing in the Ethics Ordinance says otherwise... If City officials cannot express opinion, debate the merits of those opinions and vote their consciences, the quality of our City's democracy would be significantly impaired."

We will now turn our attention to the specific sections of the Code of Ethics either cited by the City Manager in his Request and/or discussion by members of this Board at the hearing of this matter. This Board finds that Mr. Oh's conduct in this matter did not conform with the following sections of the Ethics Ordinance.

Section 2-320. The Code of Ethics begins with Section 2-320, entitled "Public Policy." This section discusses public trust as well as that one may not use a public office for personal gain, as the City Manager has argued herein. The following paragraph, from the Wisz opinion, has application herein, and it provides:

"The Ethics Ordinance provides that public office is a public trust. Birmingham Code of Ordinances, §2-320. The Code of Ethics is intended to provide public officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants. Id. §2-320. The Ethics Ordinance requires City Officials, as defined in §2-322, to avoid conflicts between their private interest and the public interest. City Officials are fiduciaries, and their positions are held in public trust. City Officials must not use their public office for personal gain. Id. §2-320(3). In Mr. Wisz's subject signature block, the emphasis was on the Birmingham Traffic and Safety Board over any other item listed in the signature block. Such over-emphasis could create the appearance of Mr. Wisz speaking on behalf of the City."

The same is true as to Mr. Oh in this case, especially as "private gain" is broadly defined in Section 2-322, to mean "any interest or benefit, in any form, received by the City employee or official." Both Mr. Oh's use of his official position in his petition, as well as his dissemination of information that he was advised by City Staff in advance was incorrect, create the appearance of an action and type to be for personal gain, and with the risk of adversely affecting the public trust.

Section 2-321. While this section of the Code pertains to the responsibilities of public office, and primarily discusses official acts and conduct (as opposed to private acts and conduct), this Board

⁶ Mr. Oh's identification of himself as a TDCIA member was even more prominent than in the instances cited in Complaint 2020-01 and Advisory Opinion 2009-02.

has previously opined that this section mandates that all City Officials protect public confidence by being honest, fair and respectful. Mr. Oh adversely affected the confidence of the public and the integrity of City government, as he also demonstrated a disrespectful attitude towards the City and its Staff. Mr. Oh did not exhibit respect in his actions with City staff either prior to or during the subject hearing. This Board understands that Mr. Oh during the hearing did offer an apology of some nature. His gesture suggests to this Board that the time and effort put in by City Staff, as well as this Board, to address this matter may be beneficial to all concerned in the future. City Officials are obligated to do their best to ensure that statements they are making are true.

Section 2-323. The City Manager has cited subsections 1, 3, 4 and 5 as potential violations (i.e. non-compliance). This Board concludes that subsections 1 and 5 have application. Section 2-323 pertains to the intention of the Code. It points out in pertinent part that City Officials should avoid any action, whether or not specifically prohibited by Section 2-324 (Promulgation/Conflict of Interest) which might result in, or create the appearance of, in this case:

- (1) using public office for private gain; and
- (5) affecting adversely the confidence of the public or the integrity of the city government.

This section also describes that the Code of Ethics is not intended to be punitive but rather preventative. Accordingly, the Code should not be interpreted to in any way interfere with, or abrogate, any statute, ordinance, City Charter, and/or rights or remedies.

Section 2-324. The City Manager indicated his concern with a potential violation (i.e. non-compliance) of Section 2-324(a)(2) and (9). This Board has determined that subsections (2) and (8) have application. Subsection (2) provides as follows: "No official or employee of the city shall represent his or her personal opinion as that of the city." Subsection (8) reads: "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."

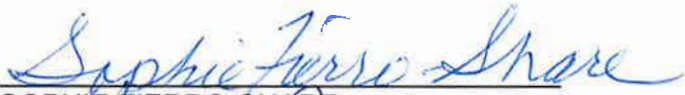
V. Conclusion

This Board concludes that for the reasons stated above, Mr. Oh's complained of conduct did not conform to the Code of Ethics. While we recognize that Mr. Oh has been a City Official for a brief period of time, his subject actions appear to be rooted in his personal interests and/or attitude, and not his inexperience and/or unfamiliarity. His conduct clearly evidences, as well as his own admission, that he has little, if any, familiarity with the Code of Ethics, though he was duty-bound to acquaint himself therewith and attempt to understand same. The Code of Ethics was specifically identified and emphasized as a subject of importance from the start of his official engagement with the City by way of the language of the City's required Affidavit and Disclosure Statement. This has apparently caused Mr. Oh to make some poor decisions as it relates to the aforesaid two underlying questions relating to his conduct herein. City Staff attempted to address Mr. Oh's conduct in various ways, and finally had to file the subject request. The City is required by the Ethics Ordinance to provide this type of guidance, as noted in Section 2-320. It appears that through this Ethics Board process Mr. Oh better understands the importance of City Officials working cooperatively together.

While this Board's Advisory Opinion will be published and communicated to the City Commission and the public (pursuant to Section 2-325(b)(2)), it is intended to assist Mr. Oh with respect to his future conduct. In that regard, it may be viewed as preventative and educational, and the City is providing Mr. Oh herewith additional adequate guidelines for separating his roles as a private citizen from his role as a public servant. Nevertheless, pursuant to Code of Ethics Section 2-325(b)(3) after this Opinion is published and communicated to the City Commission, it shall be responsible for imposing any sanction.

As a final remark in this Opinion, for the benefit of Mr. Oh and all other City Officials, we wish to emphasize an important underlying theme of this Opinion, by reciting the following from the Advisory Opinion 2009-02 pertaining to Mr. Wisz, as follows:


"Accordingly, this Opinion celebrates the rights of free speech, but also addresses the self-imposed limitations thereof when one voluntarily elects to become a City Official. When one serves in the public sector, one becomes less and less a 'public citizen' and more and more a 'public servant.' This is part of the responsibilities and burdens one accepts as a public official. Being a public servant may constrain one's activities in many ways, including the open expression of personal views. Having the right to engage in an activity doesn't mean exercising that right is necessarily the best course of action."



SOPHIE FIERRO-SHARE



JAMES D. ROBB, Chairperson



JOHN J. SCHROT, JR.