

BIRMINGHAM BOARD OF ETHICS

ADVISORY OPINION

2023-01

INTRODUCTION

Birmingham City Manager Thomas Markus asked the Birmingham Board of Ethics for an advisory opinion as to whether certain conduct or anticipated conduct of Birmingham City Commissioner Brad Host conforms to the Birmingham Code of Ethics. Commissioner Host, through counsel, responded in writing. The parties then appeared in person and presented their positions at a Board hearing on March 7, 2023. This advisory opinion presents the Board's decision.

SUMMARY OF DECISION

The city manager's written Request for Advisory Opinion (hereafter, "Request") focuses on Commissioner Host's actions concerning *Birmingham Plan 2040*, a proposed master plan for the physical development of the community. His actions particularly included written and video social media posts and correspondence to constituents. As one of seven elected members of the Birmingham City Commission, Commissioner Host will vote for or against the plan. Core to the city manager's Request is the concern that Commissioner Host's comments ahead of that vote reflect bias, interfere with the proper function of government, and could result in a conflict of interest.

The Board finds that some of Commissioner's Host's conduct fell short of what the Code of Ethics requires. Some of his communications about the 2040 Plan contained misstatements of fact, and all of them failed to identify whether he was speaking in his official or private capacity. The Board also finds, however, that Commissioner Host later corrected or withdrew most of the communications containing those misstatements. Through this opinion, the Board offers advice to Commissioner Host and other city commissioners on more closely conforming to the Code of Ethics—both as to how they not only must conform to the Code's minimum requirements, but how they can exceed those minimum requirements and fulfill the hope expressed in the Code that the conduct of public officials meet the highest ethical standards.

MOTION TO DISMISS: DENIED

By written response and oral argument of his counsel at the hearing, Commissioner Host moved to dismiss the matter, contending that the Request failed to present each question upon which an opinion is desired, did not include all facts

giving rise to each question presented, and did not include all relevant authorities, as required on the city's advisory opinion request form.¹ Commissioner Host also moved for a summary decision on the basis that the Request is barred by other disposition of the matter or for a summary opinion on the basis that there is no genuine issue of any material fact.²

The Board denied the motions, ruling that the Request provides sufficient basis for it to proceed with the matter. The Board found that the issues, facts, and legal standards were stated sufficiently for it to render advice to Mr. Host and the city. Indeed, the Request presented those matters with particularity. The Board further ruled that there has been no prior disposition of the matter, and there exists a genuine issue of material fact.

DECISION

FINDINGS OF FACT

Birmingham Plan 2040

The Michigan Planning Enabling Act provides for the City of Birmingham to adopt a master plan for its future. The statute says that the general purpose of a master plan is to "guide and accomplish" local development that satisfies specified criteria. The plan needs to be "coordinated, adjusted, harmonious, efficient, and economical." It must consider "the character of the planning jurisdiction and its suitability for particular uses, judged in terms of such factors as trends in land and population development." And it must be designed in accordance with present and future needs to "best promote public health, safety, morals, order, convenience, prosperity, and general welfare." (MCL § 125.3807 (2) (a)-(c)).

A key element of Birmingham's current planning is its proposed *Birmingham Plan 2040*, a comprehensive master plan that is nearing completion after a four-year process. That process has involved countless hours of citizen input, drafting, and review by city staff and consultants, and consideration by the Birmingham Planning Board and the Birmingham City Commission. To support that effort, the city provided a social media platform to post drafts and reviews of the plan and to solicit and receive comments from citizens. (See <https://www.thebirminghamplan.com>).

As contemplated by the statute, the 2040 Plan, as it has become known, is intended to guide the city's land-use decisions for years to come. It does not set

¹ Birmingham Board of Ethics Rule 201 requires an advisory opinion to be in writing and filed with the Birmingham City Clerk on a form prescribed by the clerk, who will present it to the Board for consideration. Rule 202(a) allows the clerk to administratively dismiss a request for advisory opinion that fails to comply with Rule 201.

² Rule 204 allows the Board to issue a summary decision without hearing if the request is barred by other disposition of the matter. Rule 205 allows for a summary opinion if there is no genuine issue of material fact.

specific requirements for that use; those requirements must by law be established through the city's zoning activities that involve several city boards or commissions and, ultimately, the city commission. Rather, it presents a vision for the future by expressing long-range goals and objectives to inform the city's future planning and zoning decisions. The plan does not direct those decisions.

Among other techniques, the 2040 Plan employs a land-use planning concept called "seams." Seams are areas of land that serve as connectors across planning districts and as buffers between districts and other types of neighborhoods. For example, sometimes multi-family dwellings are permitted in a seam as a buffer between single-family dwellings and larger, active roadways.

Commissioner Host's Stated Opposition to the 2040 Plan

Over the years, Commissioner Host has established a reputation of favoring single-family homes over large-scale and multi-family development within Birmingham. As work on the 2040 Plan nears completion, Commissioner Host has acted against it. Across the fall of 2022, he published on social media a series of video clips containing the following statements (the Board has highlighted particular factual assertions):

Video # 1 (date uncertain): "Hey, here we are at Grant and Lincoln. And **in the 2040 Plan as proposed, they're going to rezone to multiples all of the south side of Lincoln** between here and Woodward. If you are in the St. James or Pierce neighborhood, what do you think about that? **Do you want this rezoning?** We have attached a link so you can tell the Planning Board and the master planners what you think."

Video # 2 (October 31, 2022): "Here I am on Oakland Street between the Woodwards, looking at the Little San Francisco area. And this is full of gorgeous homes and they're right here. **And these five homes as well as the two lots over near Woodward are going to be rezoned to multiple. How long do you think these gorgeous homes are going to last after they're rezoned.** What do you think? There's a link attached. Write the master planners as well as the Planning Board. **You've got 45 days to get your opinion in because then it's going to be history after that.**"

Video # 3 (October 29, 2022): "Quarton Lake Waterfall area. And you know, I just was reading the **2040 Plan and it calls for kiosks, cafes, food trucks, commercial endeavors here.** Why? I attached the link. Let the city planners and the Planning Board know what you think."

Video # 4 (September 27, 2022): "Hi. I'm here at Abbey and Wimbleton in the fabulous Poppleton Park neighborhood. And I just want to show you what some of the construction is doing to the ambience of this neighborhood. We have four houses in a row being built that all comply with our zoning

ordinances. But I think the ordinances are more friendly to the developers because they're **building lot line to lot line**. And what we need are building ordinances which are more friendly to the neighbors and the neighborhood. What do you think?"

Video # 5 (date uncertain): "Hi. I'm in the beautiful Poppleton Park neighborhood. And **in the proposed 2024 Plan, they're going to rezone these two houses on Poppleton and turn them into multiples**. What do you think? There's a link attached. Give us your opinion. You have time to tell the master planners and the Planning Board **what you think about this rezoning proposal**. Please do."

(Request, at 2 (emphasis supplied)).³ In none of these videos did Commissioner Host identify himself by name. Nor did he indicate whether he was acting in his official or personal capacity.

At the Board's hearing on this case, Commissioner Host declined to identify who video-recorded the statements, instead calling that person "a friend." He said his friend shared his opinion about the 2040 Plan. When asked how it came to be that he, rather than his friend, would appear on camera, Commissioner Host acknowledged that his role as a city commissioner was determinative. He wanted to show his constituents that he was standing up for them. As Commissioner Host said, "I happen to know everybody." According to testimony, Commissioner Host received the largest number of votes amongst multiple candidates when he was elected to the city commission.

Commissioner Host's Knowledge That the Plan Does Not Rezone Property

Commissioner Host has known since early 2021 that "a master plan does not rezone property. It is a framework setting the course for what the City may or may not do in the future." (See the city's press release of February 11, 2021, Request, Attachment 2, at 2). A city FAQ published on February 10, 2021, and again on October 13, 2021, elaborated on the point that the 2040 Plan does not rezone properties:

Is the Master Plan rezoning the City?

No. The Master Plan will include a Future Land Use map, but not a new zoning map. The Master Plan recommends that the City study and revise its current zoning code, but does not establish any updated zoning. The Master Plan recommends that zoning be updated for two primary purposes: 1) to simplify but not substantively change zoning in the Downtown and Triangle District, and 2) to better align neighborhood zoning with existing character to avoid new houses that are out of character. Other zoning changes are recommended for

³ These statements are found in links provided in the Request.

further study by the City.

(*Id.*).

Commissioner Host was reminded of these elements of the plan during Birmingham City Commission meetings on October 3, 2022, and November 28, 2022. During the latter meeting, the city manager's report called out some of Commissioner Host's videos and ensuing conversation surrounding it. The city manager noted the "continued assertion or idea that the 2040 Plan will be rezoning single-family homes to build multifamily, and that somehow the City of Birmingham is ignoring its residents in favor of developers and profit." (*Id.* at 1). The city manager's report, in a section titled "Setting the Record Straight," reiterated to Commissioner Host that "comprehensive master plans do **not** rezone property once adopted." (*Id.* at 2 (emphasis in original)).

Shortly after the November 28, 2022, city commission meeting, Commissioner Host deleted four of the five videos but mistakenly left Video # 1 up. When the city manager reported at the December 19, 2022, city commission meeting that the video remained on line, Commissioner Host responded that "I found this out today . . . that that video was up, and I took it down, and I'm very sorry." (Request, at 3 (link to city commission meeting of December 19, 2022, beginning at 2:28.50)).

Following the November 28, 2022, city commission meeting, Commissioner Host published four more video statements critical of the 2024 Plan.

Video # 6: (December 8, 2022): "Hi, I'm Brad Host and I'm here at Grant and Lincoln. And the 2040 Plan **proposes to take all the single family houses between here and Woodward and encourages them to be zoned multiples.** I wonder what the St. James and the Pierce neighborhoods think about that. **You got until January 11th to let the planners and the Planning Board know what you think.** I've attached a link below and I hope you use it."

Video # 7 (December 11, 2022): "I'm Brad Host. I'm at Grant and 14 Mile. And on **page 46 of the Master Plan it proposes to take these over 45 single family houses between Grant and Woodward and wants to have them zoned to encourage infill. Well, infill is townhouses, duplexes, multi-family buildings.** What do the Pierce and the St. James neighborhood think about having this happen? **You have until January 11th to let the planner as well as the Planning Board know what you think.** See the link below."

Video # 8 (December 12, 2022): "Here's two gorgeous houses a hundred years old, at the south end of Poppleton in the fabulous Poppleton Park neighborhood. **The 2040 Master Plan, Chpt 2, asks us to embrace managed growth and encourages these two lots to be townhouses, duplexes, or multi-family buildings.** I wonder if the neighborhood and the neighbors of Poppleton Park truly can embrace this type of managed growth. **You have until January 11th to get your opinion in to the city planner and the Planning Board.** I've attached a link below. Let 'em know what you think."

Video # 9 (December 16, 2022): “Learning from the Master Plan, page 35 says **it calls for updating the zoning code to permit a café in Booth Park. Café, a term subject to broad interpretation. Does it mean that this could be a Starbucks or a small building in Booth Park? This plan enables broad interpretation. What the neighbors think matters. Get your opinion in by January 11th to the city planner and the Planning Board. Use the link below.**”

(Request, at 3 (emphasis supplied)). In none of these videos except Video # 6 did Commissioner Host identify himself by name. Nor did he indicate in any of them whether he was acting in his official or personal capacity.

Leading up to the city commission’s December 19, 2022, meeting, Commissioner Host made a social media post about the 2040 Plan, saying, “The city needs your voice” and referred readers to the city’s comment channel at <https://www.thebirminghamplan.com/comment>. (Request, Attachment 5). A reader, Linda Orlans, posted:

Thanks **Brad Host**. Looks like the Planning group has gone Rogue again. What is happening to our family friendly Birmingham! So disappointing.

Commissioner Host replied:

Linda Orlans agree!

The City Manager’s Renewed Attempts to Correct the Record

At the next city commission meeting on December 19, City Manager Markus took issue with Commissioner Host’s response to Ms. Orlans’ “gone rogue” comment. Both then and in an e-mail the next day, he pointed out that the comment creates the view that Commissioner Host thinks the planning board is operating improperly. “If that was not your intent, I would suggest that you publicly acknowledge that you did not intend to disparage the Plan Board.” (*Id.*).

Commissioner Host replied:

Couldn’t conceive agreeing with a “rogue” comment. My intention was agreeing with a less friendly local environment ONLY. Have stated same to Linda. Would you want me to address this retraction with the Planning Board?”

(*Id.*).

At the Board hearing, Commissioner Host testified that he clarified his statement with Ms. Orlans, calling her to say that he did not believe the planning board had gone rogue. He did not, however, make a public retraction or apologize to the planning board.

Shortly after the last four video posts were published, the city manager again reiterated to Commissioner Host that the “2040 Master Plan Does Not Rezone Property.” (Report to the city commission on December 19, 2022, Attachment 3 to the Request, at 1). The city manager recounted inaccuracies in Commissioner Host’s communications and pointed out that the city has repeatedly corrected those inaccuracies. (*Id.*). The city manager wrote:

Despite the continued corrections issued on the matter, yet another video has been circulating on social media in which Commissioner Host stands near the corner of Lincoln and Grant, and states that “The 2040 Plan as proposed is going to rezone to multiples (sic) all of the south side of Lincoln between here (Grant Street) and Woodward”. Once again, there is a need to reiterate that comprehensive master plans do **not** rezone property once adopted.

(*Id.* at 2.) The city manager’s report went on to detail his concerns:

As discussed last month in both the City Manager’s Report and at the city commission meeting on November 28, 2022, it is very important that City staff, board members and city commissioners are factually accurate when discussing important issues with the public. The continued assertion by Commissioner Host that the Draft 2040 Plan will rezone single-family properties to multi-family zoning, despite repeated attempts by City staff to set the record straight as to the fact that master plans **do not** in fact rezone properties once adopted disregards the facts and staff’s attempts to advise him of his inaccuracies. Such communication undermines the confidence of the public in city government, and adversely affects the integrity of city government. Public office is a public trust. For government to operate properly, each city official, employee, or advisor must earn and honor the public trust through integrity and conduct.

(*Id.* (emphasis in original)). The city manager again pointed out the inaccuracies in Commissioner Host’s post (Video # 3) about how the 2040 Plan “‘proposes kiosks, cafes, food trucks, commercial endeavors here,’ referencing the waterfall at the south end of Quarton Lake at the dam.” (*Id.*). Specifically, the city manager pointed out that the Plan expressly does not contemplate food or beverage services in that area.

The city manager then commented on Commissioner Host’s December 12, 2022, post (Video # 8):

During the past week, yet another video was posted on social media by Commissioner Host regarding the Poppleton neighborhood, wherein Commissioner Host states that “the 2040 master plan asks us to embrace managed growth and encourages

these 2 lots to be townhouses, duplexes or multi-family buildings”. The change in terminology utilized in this video seems to demonstrate that perhaps Commissioner Host may be attempting to self-correct his previous misstatements as to rezoning in earlier videos.

As noted above, it is very important that City staff, board members and city commissioners are factually accurate when discussing important issues with the public, and thus city commissioners and board members should contact City staff to verify the accuracy of all public communications.

The City goes to great lengths to accurately describe the purpose of our public meetings. Having elected officials encouraging public attendance is fine. Misrepresenting what the purpose of a hearing is or the topics that are to be discussed is inappropriate and only causes conflict and needless emotional distress. As I have stated before, “Let the process work”. The city commission has appointed citizens to the Planning Board to review the master plan drafts and the board members have shown their willingness to be completely transparent and open to considering public comments which may differ from what the draft master plan calls for. The professional staff and consultants are paid to provide their professional advice, however, they recognize that their recommendations must stand the test of the public process, and are likely to be questioned, challenged and altered through the very public and transparent review process. What the public does not need is a public official misstating the proposals contained within the draft 2040 Plan or encouraging a public position for or against the various recommendations contained in the evolving drafts of the proposed master plan.

(*Id.* at 5-6).

In addition to his written report during the December 19, 2022, city commission meeting, the city manager orally informed the commissioners that “I’m getting plan board members who are really concerned about how this is agitating the public and how that is going to play out at their public hearings, to the point where they’re asking for law enforcement to be there.” (Request, at 3 (link to city commission meeting of December 19, 2022, beginning at 2:33.00)).

Following that city commission meeting, Commissioner Host distributed to homes a letter dated December 31, 2022. (Request, at 1, 2, 4, and 7, and Attachment 7). In that letter, he recited that the Birmingham Planning Board will be meeting on January 11, 2023 to hear public comments in person about the 2040 Plan. He wrote that the plan says that certain properties available for infill should be rezoned to encourage development of small homes, townhouses, duplexes, and small multi-

family buildings. The letter identifies him by name but does not give his title as a city commissioner. It does not say whether he is acting in his personal or official capacity.

CONCLUSIONS OF LAW: THE BIRMINGHAM CODE OF ETHICS

As a foundational matter, there is no question that the Code of Ethics, which is a City of Birmingham ordinance, applies to a city commissioner such as Commissioner Host. (Birmingham Code of Ethics, § 2-322).⁴

To enhance public trust, the city must provide its officials with adequate guidelines for separating their roles as private citizens from their roles as public servants. (*Id.*, § 2-320). The city does that in several ways, among them educational programs for city officials, communications from the Birmingham City Manager, and the Birmingham Board of Ethics advisory opinion process. The Code is intended to be preventative and not punitive. (*Id.*, § 2-323).

The Code sets minimum standards of ethical conduct for all city officials and employees, whether elected or appointed, paid or unpaid. It proscribes actions incompatible with the public interest and directs disclosure of private financial or other interests in matters affecting the city. (*Id.*, § 2-320). The Code promotes the city commission's declaration that "[p]ublic office and employment are public trusts. For government to operate properly, each city official, employee, or advisor must earn and honor the public trust by integrity and conduct." (*Id.*).

The Code centers around three key aspects of governmental conduct, as declared by the city commission when it adopted the ordinance:

[A]ll city officials and employees must avoid conflicts between their private interests and the public interest. Public officials and employees 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.

(*Id.*, § 2-320 (1)-(3)).

The Code sets forth a high standard of conduct by requiring that city officials:

- uphold the Constitution of the United States and the Constitution of the State and carry out impartially and comply with the laws of the nation, state, and the city.
- not exceed their authority or breach the law or ask others to do so.

⁴ *City official* or *employee* means a person elected, appointed or otherwise serving in any capacity with the city in any position established by the Birmingham City Charter or by city ordinance which involves the exercise of a public power, trust or duty. (Birmingham Code of Ethics, § 2-322).

- 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.
- 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 official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.

(*Id.*, § 2-321).

Through the Code, the city specifically intends that its officials *avoid any action*, whether or not specifically prohibited by section 2-324, *which might result in, or create the appearance of*:

- (1) Using public employment or office for private gain;
- (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.

(*Id.* § 2-323 (1)-(5)).

Furthermore, the Code's conflict of interest section prohibits certain specific conduct and defines conflicts of interest:

- (2) No official or employee of the city shall represent his or her personal opinion as that of the city.
- (3) Every official or employee of the city shall use personnel resources, property and funds under his or her official care and control solely in accordance with prescribed constitutional, statutory and regulatory procedures and not for personal gain or benefit.
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- (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.
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(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.

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(10) Determination of conflict of interest. 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 a 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

(*Id.* § 2-324 (a) (2)-(3), (5), (8), (10).

DISCUSSION AND ADVICE REGARDING COMMISSIONER HOST'S CONDUCT

It is important to note both what this matter is and what it is not. The Board of Ethics is responding to a request for an advisory opinion and is offering an opinion on whether Commissioner Host's conduct or anticipated conduct conforms to the high standards to which the Code of Ethics aspires and, where that conduct falls short, what he might have done or hereafter do to meet those high standards. (Birmingham Board of Ethics Rules Chapter 2 and Rule 215). The Code is intended to be preventative and not punitive. (Birmingham Code of Ethics, § 2-323). The Board thus issues this opinion in the spirit of educating Commissioner Host and all city officials about the consequences of their official conduct.

By contrast, this matter is not a determination based on a complaint filed against Commissioner Host by a citizen. Were that the case, the Board would determine whether his conduct is in breach of the Code of Ethics and thus is a violation of law. (Birmingham Board of Ethics Rules Chapter 3 and Rule 319). Our review of Commissioner Host's conduct is not made in the context of a hearing on a complaint where additional or different issues, and rights, might be relevant.

In light of the record and governing Code of Ethics provisions, the Board of Ethics advises Commissioner Host that some of his conduct in this matter falls short of the public's expectations and the public interest as expressed in the Code. The

Board has four main areas of concern. It encourages him to observe these comments in his future conduct.

1. Commissioner Host's Misstatements of Fact

The Board finds Commissioner Host made misstatements of fact in some of his published communications. His oft-repeated statements that “they’re going to rezone to multiples” certain homes and areas throughout the city are untrue and misleading. First, Commissioner Host has known since as early as 2021 that the 2040 Plan is not a zoning ordinance. Although the 2040 Plan certainly will inform future zoning decisions and identify areas where changes in land use might be made, he knows it is not, and does not purport to be, a zoning ordinance.

In stressing that an undefined group of people—*they*—are going to rezone properties, Commissioner Host misleads the public about who will do any rezoning and when that might occur. A reasonable person could fairly interpret his statements to mean that the planning board will rezone. More accurately, of course, the *they* is the Birmingham City Commission on which he sits.

His oft-repeated exhortations to act promptly, such as “45 days to get your opinion in because then it’s going to be history after that” or “you got until January 11th to let the planner as well as the Planning Board know what you think,” tend to mislead people into thinking that city properties will be rezoned by that deadline. He knows his proclaimed urgency is not the case. Only the city commission can rezone, and only then after a substantial public process. And although the planning board will adopt a recommendation for the plan, he also knows that the city commission is free to accept that recommendation, reject and refer it back for consideration, or adopt a modified plan. He will have a say and a vote in whatever the city commission decides.

Through these actions, Commissioner Host is not being fully honest and fair in safeguarding of the public confidence under section 2-321. He is not being fully responsible to the people under section 2-320 (1).

To be sure, some of Commissioner Host’s statements are hyperbole (*e.g.*, developers are “building lot line to lot line”). Some are grounded in the truth that the Plan can encourage zoning in appropriate areas. But the Board finds that many of his communications were careless and improvident.

The Board notes that after City Manager Markus several times corrected Commissioner Host during city commission meetings, he removed his earlier video posts (though imperfectly as one remained for three more weeks), and changed some of his communications to read, not that the 2040 Plan would rezone properties, but that it “encourages” that rezoning. The Board commends Commissioner Host on making his communications more accurate. He continued, however, his misleading suggestion that the January 11 meeting of the planning board would result in adoption of an ordinance when he knew that not to be so.

The Board thus advises Commissioner Host to be aware that his knowing misstatements of fact could suggest he is not impartial and fair, make him appear not

able to safeguard public confidence or the integrity of city government, and call his judgment into question.

During his remarks at the November 28, 2022, city commission meeting, Commissioner Host seemed to recognize the importance of the Code's requirement that Birmingham officials safeguard public confidence by being honest, fair, and respectful of all persons. In reporting on his recent attendance at the annual Michigan Municipal League conference, Commissioner Host said the following:

I went to a session that was titled *Working Together for the Good of the Community*. And that can be challenging. The biggest problem is trust. **And what I learned at that session is that politicians tend to lie, so it's hard to trust them, and that is one of the hurdles that prohibit better behavior."**

(Request, at 3 (at 45:35) (emphasis added)).

The Board urges Commissioner Host to heed the lesson he says he learned.

2. Commissioner Host's Advocacy Against the 2040 Plan

A related concern the Board has is the fact that Commissioner Host is actively advocating against the 2040 Plan, which he will be called upon to review, consider, and act on as a city commissioner. During the Board's hearing, he testified that "I was not trying to influence people; I was just trying to get them engaged." The Board sees his actions differently and warns Commissioner Host that his actions may be perceived as improperly influencing the work of the city staff, consultants, and the planning board, all of whom themselves owe the same duties of loyalty to the city that he does. While Commissioner Host's advocacy can be perceived by some as crossing the line into improper attempts to interfere with the decision-making process, the Board does not find on this record that it did. But Commissioner Host should be mindful that his actions have consequences and that some citizens could draw conclusions from his actions that he did not intend. He should recognize that possibility and be certain that he is encouraging respectful civic dialogue.

The Code of Ethics is clear that Commissioner Host—and the planning board members, too—must be independent, impartial, and responsible to the people; he and they must make governmental decisions and policy in the proper governmental channels. (Birmingham Code of Ethics § 2-320 (1)-(2)). Commissioner Host is required to avoid *any action which might result in, or create the appearance of*, losing complete independence or impartiality of action, of making a decision outside official channels, or affecting adversely the confidence of the public or the integrity of the city government. (*Id.*, § 2-323(3)-(5)). Neither may he represent his personal opinion as that of the city. (*Id.*, § 2-324(a)(8)).

Because public office is a public trust (*id.*, § 2-320), Commissioner Host owes a fiduciary duty to the city, a high legal duty. He must carry out impartially the law and discharge his duties faithfully regardless of personal consideration. (*Id.*, § 2-321).

Based upon that dictate, the public is entitled to confidence in Commissioner Host, to trust that he is employing judgment in his official decision making. By actively advocating against a plan that will be coming to him for official decision, while premising that action on statements that he knows to be inaccurate, Commissioner Host suggests to the public he might not be impartial, might not be independent, might not be fair and open minded in his debates with his fellow city commissioners. His actions tend to call into question whether he can carry out his official duties faithfully regardless of personal consideration.

As is every city official, Commissioner Host is entitled to his personal opinion. And as a city commissioner, he is entitled and expected to vote based on his judgment of the merits of the proposal at issue. The Code is never intended to preclude a city official from expressing his or her opinions on matters that come before his or her respective body. It encourages city officials to act independently. If they cannot express opinions, debate the merits of those opinions, and vote their consciences, the quality of our city's democracy would be significantly impaired. (Advisory Opinion 2022-01, at 6, *citing* Advisory Opinion 2007-02).⁵ Commissioner Host is also entitled to learn the views of the citizens so he can better represent them.

But what is telling in this case is that Commissioner Host is not exhorting the citizens to give their views *to him* or to his fellow city commissioners who will decide on the 2040 Plan. He is not asking for their perspective to help him fashion *his* official position. Rather, there is a danger that his actions could be perceived as improperly influencing the work of the planning board and city staff, an influence resulting in so much agitation that planning board members were communicating the need to request police presence at the public meeting.

That kind of influence would be improper because those individuals are, like Commissioner Host, bound by the Code of Ethics to work with independence, impartiality, faithfulness, integrity, and responsibility to the people. His actions could be interpreted—or misinterpreted—as interference with their responsibilities, thus an attempt to develop policy and decisions outside of regular governmental channels, which the Code forbids. At the planning board stage of the process, the work is informational, technical, and advisory, but not political. Once the 2040 Plan comes to the city commission for formal consideration, the matter rightly becomes political. Commissioner Host thus is advised to let the city planners and the planning board do their work.⁶

The Board recognizes the strength of the city's scheme of government that takes advantage of the expertise of its citizenry. (*See* Advisory Opinion 2015-06, at 2). In electing Commissioner Host to office, the voters sought his participation on the

⁵ The Board declines to reach free-speech considerations raised by Commissioner Host because they are not necessary for this decision.

⁶ This is one of the reasons why Commissioner Host should abide the city attorney's published guidance on the law and not attend meetings of the planning board or other appointive city body over which the city commission has direct oversight. (*See, e.g.,* Attachment 8 to the Request). Though the Request raised his attendance as a possible non-conformity with the Code, the record shows that Commissioner Host refrained from attending such meetings after he received guidance from the city attorney. The Board thus declines to address this issue.

city's top elective body. They are entitled to the benefit of his experience, expertise, and judgment, the resources he brings to the city, and to his vote on matters that come to the city commission. The Board counsels Commissioner Host to ensure that his actions do not call into question his impartiality or lead to a disqualifying conflict of interest.

3. Potential for the Public to Confuse Commissioner Host's Personal Opinion with the City's Position

In only one of the nine videos, the letter, or other social media posts in the record of this hearing did Commissioner Host identify himself by name. In none of them did he identify himself as a city commissioner. Yet, as he said at the hearing, "I happen to know everybody." The record shows that he was the top vote-getter in the city commission election. The Board finds that Commissioner Host could understand that the people watching his videos know who he is and that he holds public office.

No city official may represent his or her personal opinion as that of the city. Nor may a city official use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration or preferential treatment beyond that which is available to every other citizen. (Birmingham Code of Ethics §2-324 (2), (8)). To do so places the city official in a potential conflict of interest.

In a 2009 advisory opinion, this Board held that the Code prohibited a city official, in that case Mr. David Wysz, a then-member of the Birmingham Traffic and Safety Board, from using his position on that board or his title associated with it to advocate a personal position unrelated to that board. Such conduct would be permissible, but only if it were germane to his role as a city official and if he stated that he is giving his personal opinion and not that of the traffic and safety board or the city. (Advisory Opinion 2009-02, at 2).

The record shows that Commissioner Host's communications were germane to his role as a city official. As a commissioner, he will vote on whether to adopt the 2040 Plan. But he never stated that he was giving his personal opinion and not that of the city itself. The Board finds that his communications may tend to confuse the recipients as to whether he was advocating on behalf of himself or in his role as city commissioner. 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 opinions of the city or any other city official. (Advisory Opinion 2022-01).

The Board thus advises that, going forward, Commissioner Host use care to differentiate his personal views from the city's official position when communicating on matters of city business.

4. Commissioner Host's Possible Disparagement of the Planning Board

A member of the citizenry, Linda Orlans, posted a public comment about the contemplated 2040 Plan, saying "Looks like the Planning group has gone Rogue again. What is happening to our family friendly Birmingham! So disappointing."

In response, Commissioner Host posted, “agree!” (Request, Attachment 5).

The Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. They must avoid conduct that may tend to undermine respect for city officials and employees and for the city as an institution. (Code of Ethics § 2-321). They must avoid any action which might result in, or create the appearance of, affecting adversely the confidence of the public or the integrity of the city government. (*Id.* § 2-323 (5)).

The Board finds that Commissioner Host’s agreement with the “rogue” post could reasonably be read to cast the planning board in disrepute and to undermine respect for that body and the valuable work performed by the staff and officials serving on it—many of whom are volunteers. His agreement could be interpreted as tending to undermine the public confidence and the integrity of the city government that the Code requires him to safeguard.

When challenged by the city manager about the meaning and intent of his statement, Commissioner Host reported he had clarified the statement with Ms. Orlans. He also wrote the manager that he “couldn’t conceive agreeing with a ‘rogue’ comment.” Rather, he wrote, his intention was to agree only with the “less friendly local environment” portion of Ms. Orlans’ statement.

The Board accepts Commissioner Host’s explanation that he did not intend to suggest that the planning board had gone rogue; instead, that he was agreeing only with the more limited part of Ms. Orlans post.⁷ That explanation is consistent with his published views that Birmingham currently presents a less friendly local environment in certain respects.

But Commissioner Host’s intent is not strictly relevant. The Code looks to how the public would tend to view his statements. It requires him to avoid conduct that *may tend* to undermine respect for city officials or *might result in, or create the appearance of*, affecting adversely the confidence of the public. Notably here, he did not publicly retract or even clarify his statement, except to Ms. Orlans. Nor did he apologize to the planning board as the city manager suggested he do. He may have failed to consider how others would view what he wrote. This Board has previously held that “[p]ublic officials are obligated to be aware that their words could be misinterpreted or misread.” (Advisory Opinion 2002-01, at 6.) His statement was, again, careless and improvident.

CONCLUSION

The Board of Ethics thanks both City Manager Markus and Commissioner Host for participating in this advisory process. Both showed good faith in presenting reasoned, in-depth positions with vigor. We encourage them to work together to improve city government in service to our citizens.

⁷ If Commissioner Host believes that the planning board has gone “rogue,” he might have a duty to raise his concerns with the city commission.

The Board advises Commissioner Host, his fellow city commissioners, and all city officials and employees as follows.

You have an obligation to be truthful in your statements and dealings. To do otherwise greatly risks harming the public's confidence in our government. It subjects you to personal criticism, thereby diminishing your ability to serve your public role.

You must be careful in trying not to achieve an outcome outside of proper governmental channels. Doing so undermines the public's confidence in the government and in processes. It interferes with and diminishes the ability of those rightfully assigned to a task to perform their duties in furtherance of the city's objectives. Advocacy outside of proper governmental channels may result in or create the appearance that you have lost impartiality or independence of action. It also puts you personally at risk of a conflict of interest that could disqualify you from making a decision that you were elected or appointed to make.

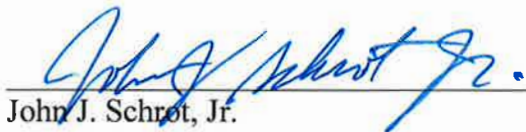
When publishing a personal statement about a city matter in which you are identified or widely recognized as a city official, you must use care to differentiate your personal views from those of the city by communicating that the views expressed are your personal views and not those of the city or another city official.

You have an obligation to be aware of how your public statements could be understood, and how they could be misread, misconstrued, or viewed as misleading. When you do not fully consider the impact of those statements, you risk undermining respect for city officials and employees, limiting their ability to fulfill their responsibilities, and subjecting yourself to diminished respect and ability to perform your own official duties.



James D. Robb, Chairperson

Sophie Fierro-Share



John J. Schrot, Jr.