

BIRMINGHAM BOARD OF ETHICS

SEPARATE OPINION

2023-01

I agree with most of the Advisory Opinion. I write separately because there is one important item in the Advisory Opinion with which I do not agree and I want to expand upon an item that I believe the Advisory Opinion does not give enough attention to.

I.

The Advisory Opinion finds fault with Commissioner Host encouraging residents to make their opinions known to the Planning Board rather than to him or to the other commissioners. (Page 14). I see nothing wrong with that. As far as I know, every public meeting in Birmingham, even ours, has an opportunity for public comment. One of Birmingham's strengths is that citizen involvement is available at all levels of government. The Advisory Opinion quotes the City Manager's statement that "Having elected officials encouraging public attendance is fine". (Page 8) The City's web page for the 2040 Plan, https://bhamgov.org/about_birmingham/city_departments/planning_department/citywide_master_plan.php, encourages direct communication from citizens. It says: "The site includes relevant data, surveys and documents and an email communication option that allows residents to send comments directly to the planning team. Please make sure your voice is heard." The Planning Board is not immune from public comment. They want public comment on the 2040 Plan. Limiting Commissioners to encouraging people to give their opinions only to a Commissioner would interfere with the people's right to communicate directly with the Planning Board and for the Planning Board to hear directly from the people, since Commissioners cannot attend Board meetings, even to summarize the public feedback they have received. (Footnote 6).

I accept Commissioner Host's testimony that he was not trying to influence anybody; he was merely trying to get the public engaged. Of course, there are acceptable and unacceptable ways to encourage public comment. It would violate the Ethics Ordinance to urge members of the public to be disrespectful or to resist the adoption of a particular policy violently or through intimidation or "by any means necessary." We were not presented with any statement by Mr. Host that in my opinion could reasonably be interpreted as inciting improper activity. The

evidence does not even suggest that Commissioner Host encouraged people to give their opinion in person. Eight of his nine videos had a link to submit opinions electronically; the ninth simply asked “what do you think?” Commissioner Host was not unethical in telling residents to “let the Planning Board know what you think.” I think the advice in the Advisory Opinion is too restrictive on this point.

II.

The Advisory Opinion properly recognizes a distinction between advisory opinions and complaints. It notes that additional or different rights or issues might be relevant if this were a complaint. I think it is important to say a few words about what some of those issues might be.

The very first section of the Ethics Ordinance announces that it sets “minimum standards of ethical conduct”. 2-320. Before listing specific acts that City officials must abide by, the ordinance states that City officials must adhere to the “highest standards of ethical conduct” (2-321), that their official conduct “*should be above reproach*” (original emphasis, 2-321), and 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” (2-323). While we all hope that our public officials will always meet the highest ethical standards, does the Ethics Ordinance really mean that the City Manager or the City Commission can sanction a City official, as they have the power to do under 2-325 (b)(3), if they act ethically, but not at the “highest” ethical standard? If so, how can the Board of Ethics decide whether conduct falls short of the highest standards of ethical conduct or is above reproach or might result in diminished confidence in the City?

I see two separate problems with Sections 2-320 and 2-321 and parts of 3-323 being standards that can lead to a violation even if there is no violation of the specific prohibitions of the Ethics Ordinance. First: Not everything that causes a loss of confidence in the City is an ethical issue. The City Commission adopts numerous policies each year. Some portion of the public, large or small, may disapprove of some of them and lose confidence in the City as a result. Commissioners who voted for the policy can’t possibly be found to violate the ethics ordinance through that official conduct. Yet the Ethics Ordinance can be understood, if read literally, to prohibit any official action which “may tend to undermine respect” for the City or might “create the appearance of” adversely affecting public confidence in the City.

Second: If a matter is clearly ethical in nature, can the Board of Ethics fairly decide whether it violates the Ethics Ordinance if it is not specifically prohibited in 2-324? What is the “highest” form of ethical conduct? What is “above reproach”? Does it only take one person whose confidence in the City government is diminished (and to what degree) to trigger a violation? A majority of people, or some other standard? How does the Board of Ethics determine when conduct “tends” to undermine respect for the City or when an inappropriate “appearance” exists? Does the Board of Ethics simply decide in each case based on the subjective opinion of a majority of the members at the time? I think it is too easy for Sections 2-320, 2-321 and parts of 2-323 to become catchalls for finding fault when the Board doesn’t approve of conduct, but that conduct doesn’t violate any objective standard in the Ethics Ordinance. If Board of Ethics members have that kind of power, City officials who find themselves on the wrong side of a complaint could be in an impossible situation; with no way to know in advance what is required of them and without any effective way to defend themselves. I don’t want that kind of power or responsibility myself and I don’t think the City Commission should want to give the Board of Ethics that kind of power or responsibility.

It doesn’t solve the problem to say that the City Commission or the City Manager don’t have to impose sanctions if they don’t agree with the Board of Ethics’ judgment. There is damage from the finding. Who among us wants to be publicly found to have violated an ethics ordinance?

When I first began serving on this Board, we were called upon to determine whether conduct was acceptable under the specific standards of 2-324. Recently, we have been asked to determine if conduct violates the vaguer standards of 2-320, 2-321, or 2-323 even if it does not violate the specific standards of 2-324. I am concerned this trend will continue. I recommend the City Commission to revise the Ethics Ordinance to clearly and unequivocally state that Sections 2-320, 2-321 and parts of 2-323 express the hoped-for result when City officials act in accordance with the specific standards of Section 2-324 and it is only Section 2-324 which sets the minimum standard that City officials must meet to avoid sanctions. The Commission may want to add specific prohibitions to Section 2-324. This way City officials will know exactly what is expected of them and the Board of Ethics will have a set of workable standards to apply.


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