

BIRMINGHAM BOARD OF ETHICS

ADVISORY OPINION

2023-02

INTRODUCTION

Birmingham Commissioner Clinton Baller made request of the Birmingham Board of Ethics for an advisory opinion as to whether certain conduct or anticipated conduct of a Birmingham city official would conform to the Birmingham Code of Ethics (hereinafter “Request”). Commissioner Baller appeared in person at a Board hearing on June 23, 2023. The Ethics Board provides its advisory opinion to the questions presented as follows.

SUMMARY OF DECISION

Commissioner Baller’s concerns relate to the potential establishment and management of a private, non-profit community foundation¹ in Birmingham. The foundation would, among other things, seek donations for the sponsorship and administration of cultural events, and for improvements to the city’s park system. It is anticipated that events and improvements would be administered by third parties, including partner organizations such as Next, the Birmingham Bloomfield Art Center, Baldwin Public Library, the Music Hall Center for the Performing Arts, the Birmingham Shopping District, the City of Birmingham and other local and regional organizations involved in the arts and, in part, design and administration.

Commissioner Baller stated three specific questions to the Board, which are as follows:

1. What are the ethical considerations if an elected official, appointed official or city employee is involved in the establishment and administration of the foundation?
2. Is there any ethical concern if Commissioner Baller donates or loans the money (less than \$5,000) to establish the foundation?
3. Are there any other ethical considerations or advice from the Board of Ethics regarding the establishment and administration of a community foundation by persons involved (elected, appointed, employed) in the City of Birmingham?

DECISION

The Board of Ethics advises that on the facts presented the Code of Ethics does not bar an elected official, appointed official or city employee from involvement in the establishment and administration (e.g. officer, member of board/council/committee) of a foundation; however, a

¹ A community foundation is a public charity that typically supports local charities in a specific geographical area, primarily by facilitating and pooling donations used to address community needs.

Birmingham City Official or employee² has a fiduciary duty to the city and may not participate in consideration of any matter potentially adverse to the city, especially a request for funding or any other special consideration from the city, and the City Official would be further disqualified from participating in any official business of the city on any matter involving such a community foundation. On matters that may present a conflict of interest or may give the appearance of impropriety, the official will likely have to abstain from discussion, debate and vote. Also, a City Official donating or raising funds or performing outreach with a third party on behalf of such a community foundation must use care to insure his or her efforts do not result in a conflict with regard to any business the third party may have before the city. Also, a City Official's or employee's involvement may have some negative aspects. For example, the City Official or employee may be disqualified from acting on matters before the city that concern the foundation, contrary to the job the person was elected, appointed or employed to do. A City Official and employee must always remain vigilant about the potential for a conflict.³

This board's Advisory Opinion 2016-03 provides some further guidance, in stating:

“If on the other hand the city merely needs or wants to exchange information with the organization or monitor its activities, a lesser role such as non-voting membership or liaison might be more appropriate but just as beneficial to the city as would be a board membership. Whether such a role is acceptable to the community organization is a matter for its own judgment.”

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“The safest, cleanest way to avoid conflicts is for city commissioners to have no formal role with any organization that comes before the city. That is a policy question for the city to address.”

FINDINGS OF FACT

Clinton Baller is a Commissioner in the City of Birmingham. He is among the group of community leaders who share an interest in expanding the range of cultural events in Birmingham. Group participants have included an appointee to a City Advisory Board and several employees of the City of Birmingham, among others. The idea of a community foundation has existed in Birmingham for many years. The 2040 Master Plan recommends establishment of a community foundation. The Birmingham City Commission recently followed the advice of City Attorney Mary Kucharek and resolved that for the foreseeable future, the city (unlike some other municipalities, including the City of Royal Oak, Michigan) would not establish a community foundation, and instead would leave it to the private sector to do so. According to Commissioner Baller, Ms. Kucharek advised against the city establishing a foundation but that nothing precludes involvement by City Officials or employees in a private foundation. She also cautioned that more

² “City Official or employee” is defined in §2-322 of City’s Code of Ethics to include all officials and employees of the city, whether or not they receive compensation, including consultants and persons who serve on advisory boards and commissions.

³ Discussion of potential conflicts of interest is later addressed herein.

than three commissioners involved in such an organization might constitute a quorum under the Open Meetings Act. City Manager (former) Tom Markus expressed that the involvement of a City Official or employee in the foundation might give rise to potential conflicts of interest and advised that an Ethics Board Opinion be sought.

Commissioner Baller stated that the foundation would not be an entity of the City, and in fact would be separate and distinct from the city, but would interact with the city and other community organizations. He further commented that the city itself would not be a fiscal agent of the foundation. There would be no fiduciary duty on behalf of the city in association with the operation of the foundation in any respect. This would eliminate to an extent potential concerns with respect to oversight, the city's obligations for transparency, and/or insurance and indemnity concerns beyond any other community organization.

Commissioner Baller asserted that the foundation would not be asking for priority over any other community organization that holds events in Birmingham. There would be no formal or legal partnership between the city and the foundation. The city would not create, operate, or manage the foundation. However, a commissioner serving on a foundation board would likely be tasked with fundraising for the foundation.

The city's Code of Ethics primarily addresses actual or potential conflicts of interest. It emphasizes that public office and employment are public trusts, which is necessary for government to operate properly; and that each city official, employee, or adviser must earn and honor the public trust by integrity and conduct. Fundamental to the ordinance, and the subject Request, is that City Officials and employees must avoid conflicts between their private interests and the public interest. Therefore, these officials and employees in relation to the subject inquiry must "be independent, impartial and responsible to the people" as well as "not use public office for personal gain." §2-320. The ordinance sets "minimum standards of ethical conduct" and "directs disclosure of private financial or other interests in matters affecting the city." *Id.*⁴

For purposes of the subject Request, the Board wishes to reference §2-323(2) of the Code which states that it is the intention of §2-324 that City Officials and employees avoid any action, whether or not specifically prohibited by §2-324, which might result in, or create the appearance of giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person.

As the Code of Ethics is essentially a conflict of interest ordinance, §2-324 is most relevant in this situation. The Board of Ethics views various of the subparagraphs of subsection A thereof, pertaining to conflicts of interest, as having application. This conflict of interest section prohibits certain specific conduct, which is potentially at risk in regard to the subject request, most particularly as follows:

⁴ The definitions of "financial interests", "official duties or official action", "personal interests", and "private gain" are all defined in §2-322 of the Birmingham Code of Ethics.

- (1) No official or employee of the city shall divulge to any unauthorized person, confidential information acquired in the course of employment or service as a city official 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 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.
- (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.
- (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.
- (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, or;
 - c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest.

See §2-324.

§2-324(b) pertains to full disclosure. The Board in relation to this Request, wishes to bring to the attention of Commissioner Baller the following subsections thereof:

- (1) Responsibility to disclose. It shall be the responsibility of the official or employee to disclose the full nature and extent of his or her direct or indirect financial or personal interest in a matter before him or her.

No official or employee of the city shall participate, as an agent or representative of the city, in approving, disapproving, voting, abstaining from voting, recommending or otherwise acting upon any matter in which he or she has directly or indirectly a financial or personal interest. The official or employee shall, in such circumstances, recuse himself or herself from the matter before him or her.

(2) Disclosure of conflict of interest and disqualification.

- a. Any city official or employee who has a conflict of interest, as defined herein, in any matter before the city shall disclose such fact on the appropriate record of the city prior to discussion or action thereon and shall refrain from participating in any discussion, voting or action thereon, as follows, provided that such exceptions shall be observed as are permitted by law:
 1. A city commissioner shall disclose any conflict of interest and the nature and extent of such interest on the record of the city commission;
 2. A member of any city board, commission or committee shall disclose any conflict of interest and the nature and extent of such interest on the records of said board, commission or committee;
 3. A city employee who has a financial or other interest in a matter before the city commission or any city board, commission or committee and who participates in discussion with, or gives an official opinion to the city commission, or to such other city board, commission or committee relating to such matter, shall disclose on the records of the city commission or such other city board, commission or committee, as the case may be, any conflict of interest and the nature and extent of such interest.

For initial guidance as to when a conflict of interest may or may not require recusal, the reader should review also §2-324(b)(2)b of the ordinance. For further guidance relative to disclosure and/or recusal, see this Board's Advisory Opinions 2003-03, 2015-06, and 2018-02.⁵ Also, for further discussion of conflicts between private interests and public duties of City Officials and employees, see this Board's Advisory Opinion 2018-02.

DISCUSSION OF POTENTIAL CONFLICTS OF INTEREST

As previously stated, this Board's prior Advisory Opinion 2016-03 is informative as to the Request herein. In that matter, the question pertained to whether or not it was a violation of the City of Birmingham's Code of Ethics for a member of the Birmingham City Commission to serve as a member of a board of directors of, or an advisory committee to, a community-based organization that solicits or receives funding from the city when the particular seat on that board

⁵ Mr. Baller is a "City Official" pursuant to §2-322 of the Code, in that he is a person who has been elected and serving in a capacity with the City established by City Charter or by City Ordinance which involves the exercise of a public power, trust or duty. He serves as a City Commissioner. Accordingly, pursuant to §2-325(b), this Board has the authority to issue the requested advisory opinion.

or committee is reserved for a city commissioner and the City Commission by resolution appoints a particular commissioner to that seat. The Board of Ethics answered that question in three parts, as follows:

(1) The Board of Ethics holds that a city commissioner's membership on the board of directors of a community-based organization at the request of that organization and upon the approval of the City Commission does not per se violate the code of ethics. But the Board also holds that:

- the commissioner is barred by the code of ethics from participating in that organization's consideration of a request to the city for funding, license, or other substantial support from the city,
- the commissioner is disqualified from participating in the city's consideration of any such request from that organization, and
- the commissioner's participation in fund-raising activity for the organization could result in a conflict of interest if the party from whom the gift is sought has business before the city.

(2) The Board of Ethics holds that a city commissioner's participation on an advisory committee of a community-based organization at the request of that organization and upon the approval of the City Commission does not per se violate the code of ethics. But the commissioner's participation in fund-raising activity for the organization could result in a conflict of interest if the party from whom the gift is sought has business before the city.

(3) The Board of Ethics finds that, even where no conflict of interest arises, the commissioner's participation on such a board of directors or advisory committee could be deemed imprudent or politically undesirable.

As in Advisory Opinion 2016-03, there is no showing on this record that the commissioner has reason to believe that he will derive a monetary gain or suffer a monetary loss by reason of his official activity. §2-324(a)(10)(b). The Board of Ethics is not aware of any other legal prohibition generally for certain involvement in a foundation. §2-324(10)(c). It is not necessarily adverse to the public interest in the proper performance of said official's or employee's governmental duties. §2-324(a)(10)(a). Accordingly, by virtue of some limited involvement in a foundation, a conflict of interest situation pursuant to the Code of Ethics does not exist. It is what the commissioner does in that role that matters.

However, a City Official's and/or employee's involvement in the establishment and/or administration of a foundation, or the loaning of money to same, may present a potential conflict of interest. A City Official or employee has to be careful that he/she not "engage in or accept employment or render services that are "incompatible or in conflict with the discharge of

his...official duties” or in “employment (that) may tend to impair his...independence of judgment or action in the performance of his or her official duties.” §2-324(a)(6).

Additionally pointed out in this Board’s Advisory Opinion 2016-03, a city commissioner’s service on a board of directors creates a potential conflict of interest because the board is that entity’s corporate governing body. The directors of such an organization owe that entity a fiduciary duty. As stated on page 8 in said Advisory Opinion: “Directors must act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, in the manner they reasonably believe to be in the best interests of the corporation. MCL §450.2541.” This cited Advisory Opinion further provides that:

Of course, a city commissioner’s services as a member of the NEXT board of directors or the BYA committee would include tasks and duties unrelated to business with the city, which thus would not necessarily result in a conflict of interest. Accordingly, membership on that board or committee is not a conflict of interest per se, and our holding is distinguishable from our earlier decision involving Ralph L. Seger, Complaint No. 2004-02 (June 8, 2004). In the *Seger* case, the respondent, then a member of the city’s general investment committee and Barnum steering committee, was also a fiduciary in an organization – a fund to prosecute litigation against the city – whose sole purpose was adverse to the city.

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That said, the Board of Ethics holds that a city commissioner may not consistent with the code of ethics participate in consideration of any matter before the NEXT board of directors related to a matter that could come before the city of Birmingham or that could “result in or create the appearance of” using public employment or office for private gain, giving or accepting preferential treatment, or affecting adversely the confidence of the public or the integrity of the city government. Specifically, the code bars a commissioner from participating in NEXT’s consideration of a request for funding, license, special services, or benefits from the city. The commissioner is likewise disqualified from participating in the city’s consideration of any request from NEXT.

As noted above, the code of ethics does not prohibit a city commissioner from serving as a member of a community organization’s advisory committee such as the BYA GCC. But a commissioner serving in that role must remain mindful of the potential for a conflict. He or she must be vigilant if any of the organization’s business comes before the city and must make the judgment as to whether to disclose or refuse himself or herself in the matter before the city. Even if the risk of that conflict is less than the one facing a member of the

NEXT board, that risk is real and depends on a variety of circumstances. An important one concerns fund raising.

§2-320 of the ethics ordinance discusses public policy, and makes it clear that the guiding principle for City Officials' and/or employees' decision(s) is what best serves the overall public interest in Birmingham. The public's interest is paramount. From an ethical perspective the inquiry is whether the decision or conduct will be in the public's best interest as a whole. Each case in which that principle is evaluated is unique, and must be analyzed on a case by case basis. Therefore, this Board cannot provide a wholesale thumbs-up or thumbs-down to the specific questions presented to it in this Request, nor can the Board identify all potential scenarios that must be considered in such a matter. Nevertheless, it can be said that a significant ethical issue that a City Official or employee may face in such circumstance is whether one's loyalty to one's non-profit's interests conflicts with one's duty of loyalty to the public's interest. A City Official and employee must put the public's interests ahead of those of the non-profit with which one is affiliated. Furthermore, as set forth in §2-321 of the ordinance, all City Officials and employees shall safeguard the public confidence. §2-323 further makes it clear that City Officials and employees must avoid any action, whether or not specifically prohibited by §2-324 which might result in or create the appearance of a conflict. The public must be convinced that City Officials and employees are putting the city's interest ahead of all others.

To maintain fiduciary obligations and public trust, a foundation itself would need unambiguous conflict of interest policies. These policies should require absolute transparency about the existence of potential conflicts and how they are dealt with. There is no guarantee of ethical conduct by a non-profit, but it is more likely if: (1) it ensures effective codes of conduct and compliance programs, (2) it promotes effective financial management, and (3) it institutionalizes an ethical culture.

This Board believes that it is beneficial for us all to have participation in non-profit organizations and the good work that they do, however, a City Official or employee's first duty and oath of office is to the city. It is generally not beneficial to the city to have a City Official or employee participate in a non-profit board that has business before the city. In such instance, the City Official or employee must appropriately disclose the relationship and likely abstain from actions involving the non-profit. Furthermore, there is the possibility that non-profits that do not receive some benefit from the city, while others do that have a City Official or employee involved therewith, may feel slighted.

Public perception is paramount. As stated, the ordinance begins by emphasizing "the public trust by integrity and conduct." §2-320. City Officials and employees are stewards of the public trust. If the public does not trust the city and/or the City Official, it diminishes the public trust and may even result in the removal of the City Official or employee. The public does not always understand or appreciate a City Official's or employee's good intentions or motivations. A City Official or employee cannot always be loyal to the city's interest and the interest of the non-profit.

Therefore, a City Official or employee in such instances wherein there are competing interests can only serve the public's best interests.

A conflict of interest occurs any time organizational resources are directed to the private interests of a person or persons who have an influence over the decision. A conflict of interest can occur when the person (or persons) making a decision expects something in exchange from the person in whose favor the decision is made.

Further potential conflicts of interest for City Officials/employees and/or the potential for violation of state and/or federal laws, includes such things as: (a) a City Official's or employee's involvement in fundraising for a non-profit or charitable cause, (b) the implications of payment to a City Official or employee for expenses for meals, travel, gift and/or expense reimbursement as being gifts or income, and (c) city financial transactions with the non-profit. This can also trigger questions relating to legal requirements, which by its very nature will place an added burden and expense in association with the city's attorney.

Finally, public service is a public trust requiring one to place loyalty to the Constitution, the laws and ethical principles above private gain. Ethical principles allow the officials and employees within the city to have the ability to make the right decisions and policies that will positively affect them and the people associated therewith. This Board again, as in its Advisory Opinion 2016-03, refers the reader to the appended article thereto for guidance, published by the Institute of Local Government entitled "Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder."

Approved:



James D. Robb
Chairperson



John J. Schrot, Jr.