

**City of Birmingham
Board of Ethics Minutes
February 15, 2021
151 Martin, Birmingham
Virtual Meeting ID: 996 5685 2194**

I. CALL TO ORDER

Chair Fierro-Share called the meeting to order at 1:30 p.m.

II. ROLL CALL

Present: Sophie Fierro-Share, Chair (located in Birmingham, MI)
James Robb, Board Member (located in Birmingham, MI)
John Schrot, Board Member (located in Birmingham, MI)

Absent: None

Also Present: City Attorney Kucharek

Administration: City Clerk Bingham, Peter Gojcay - Legal Counsel from Beier Howlett

III. APPROVAL OF MINUTES

MOTION: Motion by Member Robb, seconded by Member Schrot:
To approve the minutes of November 20, 2020 as submitted.

ROLL CALL VOTE: Ayes, Member Robb
Member Schrot
Chair Fierro-Share
Nays, None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. Consideration of Matter 2021-01: Request for Advisory Opinion (Kucharek)

City Attorney Kucharek clarified that she and Michael MacDonald serve as consultants to, not employees of, the City.

She then reviewed her request for an advisory opinion.

Member Schrot noted preliminarily that he knows City Attorney Kucharek professionally since they are both attorneys and that she is known to conduct herself with integrity. He continued that Beier Howlett did the estate planning for both of his parents. While Beier Howlett did that work on his behalf, the estate has been closed and City Attorney Kucharek was not involved in that process. He said he did not believe this represented a conflict of interest for him but was open to his fellow Board members' opinions.

Both Member Robb and Chair Fierro-Share said they did not believe Member Schrot's disclosure represented a conflict of interest.

In reply to Member Robb, City Attorney Kucharek said that if the City were to request any work from her regarding Hubbell Roth Clark (HRC) said work would be carried out by either Peter Gojcay or Michael Gibbons, both attorneys at Beier Howlett. She said she had no doubt about their capacities to represent the City's interests vis-a-vis HRC. City Attorney Kucharek stated she would not participate in any work for the City regarding HRC.

In reply to Chair Fierro-Share, City Attorney Kucharek said that if the City were ever to be in an adversarial position with HRC the City could always seek legal counsel beyond Beier Howlett for that single issue.

In reply to Member Robb, City Attorney Kucharek said she and her fiancé are both fully aware of, and comfortable with, the fact that they would have to be careful even in their personal discussions to not share any information that could create a potential conflict of interest to the City.

In reply to Member Robb, City Attorney Kucharek said she did not believe her relationship with Mr. MacDonald would be likely to result in the perception of a conflict of interest because of HRC's decades-long professional relationship with the City.

MOTION: Motion by Member Robb, seconded by Member Schrot:
To close the record.

ROLL CALL VOTE: Ayes, Member Robb
Member Schrot
Chair Fierro-Share

Nays, None

There was Board consensus that Beier Howlett could sufficiently enact an ethical wall between City Attorney Kucharek and other attorneys at the firm who might in the future handle matters on behalf of the City regarding HRC. They agreed that there is precedent in both general legal practice and Ethics Board opinions for an ethical wall being adequate to avoid conflicts of interest that might otherwise arise.

There was Board consensus that should a particularly adversarial matter arise between the City and HRC, such as one that might result in litigation, the City likely should not be represented by Beier Howlett for that matter and should retain outside legal representation.

Chair Fierro-Share said the Board should clarify what kind of matter with HRC would be adverse enough to merit the City seeking outside legal counsel.

Member Schrot said the following parts of the Ethics Ordinance were relevant to this advisory opinion: Section 2-321; Section 2-322; Section 2-323(2) and 2-323(5); Section 2-324(a)(1), 2-324(a)(6), 2-324(a)(7), 2-324(a)(8), 2-324(a)(10); and, Section 2-

324(b)(2). He suggested Board of Ethics cases 2009-01, 2012-01, and 2018-02 could also help inform the advisory opinion on this case. He noted that because it would be very atypical for City Attorney Kucharek to be informing any decision-making on the part of the City regarding HRC, the likelihood of a conflict of interest is remote.

Member Robb said Member Schrot's list was largely comprehensive and only wanted to add a few additional sections of the Ethics Ordinance for consideration in the writing of this advisory opinion: 2-320(1), 2-320(2), and 2-320(3); 2-323(3) and 2-323(4); and, 2-324(a)(5).

Member Schrot said this matter posed no obvious conflict of interest and that City Attorney Kucharek was proposing safeguards should any conflicts of interest arise. He noted that an advisory opinion -- even if it finds no conflicts-of-interest at the time of its writing -- does not function as a guarantee that no future conflicts of interest could arise in the matter since circumstances change.

While acknowledging City Attorney Kucharek's trustworthiness and good intent, Chair Fierro-Share clarified that an advisory opinion should not be primarily dependent on the good character of the person seeking the advice. She said it was imperative that the advisory opinion move beyond the good character of the person seeking the advice to be more broadly applicable regardless of a person's intent.

Member Robb said one of the most important aspects of this matter in the future would be the disclosure by City Attorney Kucharek of potentially emerging conflicts of interest.

City Attorney Kucharek confirmed that if any potential conflicts of interest were to arise she would present the matter to the City Commission and a proposed approach to handling the conflict. She also confirmed that City Manager Markus was aware of, and comfortable with, both her relationship with Mr. MacDonald and her seeking an advisory opinion from the Ethics Board.

In order to avoid creating the perception of a conflict of interest, Member Schrot said City Attorney Kucharek and Mr. MacDonald should also likely abstain from any familiar, non-professional behavior in public, City-related proceedings. He said that would include abstaining from the use of any City-owned technology, such as City phones or City email addresses, to conduct non-professional correspondence with each other.

It was determined that Member Schrot would compose the first draft of the advisory opinion for this matter.

VI. PUBLIC COMMENT

None.

VII. ADJOURN

Chair Fierro-Share adjourned the meeting at 3:00 p.m.

Alexandria Bingham, City Clerk