

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
DECEMBER 19, 2023
MUNICIPAL BUILDING, 151 MARTIN
2:30 PM**

I. CALL TO ORDER

James Robb, Chairperson

II. ROLL CALL

Alexandria Bingham, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of September 26, 2023

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

- A. Case 2023-04 (Canvasser advisory opinion)
- B. Case 2023-03 (Reagan complaint) with the following notation:
Consideration of:

Summary decision under Rule 304 (e), under which the board may issue a decision on the complaint when the complaint on its face fails to demonstrate any violation of the code of ethics, and

Summary opinion under Rule 305, under which the board may issue a decision on the complaint without a hearing if no genuine issue as to any material fact exists.

- C. Consideration of organizing and producing an ethics workshop for city officials in early 2024.

VI. PUBLIC COMMENT

VII. BOARD COMMENT

VIII. ADJOURN

Should you wish to participate, you are invited to attend the meeting in person or virtually through ZOOM:
<https://us06web.zoom.us/j/99656852194> Meeting ID: 996 5685 2194

You may also present your written statement to the Board of Ethics, City of Birmingham, 151 Martin Street, P.O. Box 3001, Birmingham, Michigan 48012-3001 prior to the meeting.

NOTICE: Individuals requiring accommodations, such as mobility, visual, hearing, interpreter or other assistance, for effective participation in this meeting should contact the City Clerk's Office at (248) 530-1880 (voice), or (248) 644-5115 (TDD) at least one day in advance to request mobility, visual, hearing or other assistance.

Las personas que requieren alojamiento, tales como servicios de interpretación, la participación efectiva en esta reunión deben ponerse en contacto con la Oficina del Secretario Municipal al (248) 530-1880 por lo menos el día antes de la reunión pública. (Title VI of the Civil Rights Act of 1964).

I, Alexandria Bingham, the duly appointed City Clerk for the City of Birmingham, certify this meeting notice was posted at all four entrances into the Municipal Building, and to www.bhamgov.org on November 21, 2023.

**City of Birmingham
Board of Ethics Minutes
September 26, 2023
151 Martin, Birmingham**

I. CALL TO ORDER

Chair Robb called the meeting to order at 1:00 p.m.

II. ROLL CALL

Present: Chair James Robb; Board Members Michael Coakley, John Schrot

Absent: None

Staff: City Manager Ecker; City Clerk Bingham, City Attorney Kucharek

III. APPROVAL OF MINUTES

A. Approval of minutes of June 23, 2023

MOTION: Motion by Chair Robb, seconded by Mr. Coakley:
To approve the minutes of June 23, 2023 as submitted.

VOICE VOTE: Ayes, Chair Robb
Mr. Coakley
Mr. Schrot

Nays, None

The Chair thanked the City Clerk and her Staff for the minutes.

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

A. Consideration of draft advisory opinion 2023-02 requested by Commissioner Clinton Baller regarding the potential establishment and management of a private, non-profit community foundation in Birmingham

Mr. Schrot introduced and reviewed the draft advisory opinion.

The Board discussed minor updates to the draft opinion. CC Bingham integrated the updates into the draft opinion during the discussion. All updates were added by Board consensus.

Messrs. Coakley and Schrot offered their concurrence with the draft advisory opinion.

Public Comment

Commissioner Baller thanked the Board for the opinion.

MOTION: Motion by Mr. Schrot, seconded by Mr. Coakley:

To adopt the opinion as edited.

VOICE VOTE: Ayes, Chair Robb
 Mr. Schrot
 Mr. Coakley

Nays, None

It was noted by the Chair that Mr. Coakley had no role in the decision of the matter since this was his first meeting with the Board.

B. Orientation of new member

The Board welcomed Mr. Coakley and provided an overview of the Board's operations.

The Board and Staff also briefly discussed future training sessions the Board might offer.

C. Selection of Chair for the Ethics Board

MOTION: Motion by Mr. Coakley, seconded by Mr. Schrot:
To have Mr. Robb continue as Chair of the Board.

VOICE VOTE: Ayes, Chair Robb
 Mr. Schrot
 Mr. Coakley

Nays, None

VI. INFORMATION ONLY

VII. PUBLIC COMMENT

VIII. ADJOURN

No further business being evident, the Board adjourned the meeting at 2:01 p.m.

Alexandria Bingham, City Clerk



Laura Eichenhorn, City Transcriptionist



Case No. 2023-04
(Assigned by clerk)

REQUEST FOR ADVISORY OPINION

The Procedural Rules of the Board of Ethics allow a city official or employee, the City Commission, or another city commission, board or committee, as defined in the Code of Ethics ("the requesting party"), to request an advisory opinion as to 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. The party whose conduct is sought to be reviewed, if it is someone other than the requesting party, is called the "subject party."

All advisory opinions will be communicated to the city commission and will be published on the city's website at www.bhamgov.org.

Written requests are subject to disclosure under the Freedom of Information Act.

Name Jana Ecker

Phone Number (248) 530-1811

Address 151 Martin Street, Birmingham, MI 48009
(Number, Street, City, State, Zip)

Position or Board (If Applicable) City Manager re: BZA Appointment

- A. State each question upon which an opinion is desired. Attach additional sheets of paper if the space provided below is not sufficient.
- B. State all of the facts giving rise to each question presented.
- C. If available, provide all relevant statutory provisions, case law, prior opinions of the Ethics Board, and other authorities.

NOTE: Although the foregoing criteria are subject to exception when the circumstances warrant, a request which does not meet these criteria may be returned and the requestor asked to resubmit the request in an appropriate form.

Please return requests to:

City Clerk's Office, City of Birmingham
151 Martin, P.O. Box 3001, Birmingham, MI 48012

Revised 8/16/12

FOR OFFICE USE ONLY	
Accepted by <u>Alexandria Bingham</u>	Date <u>11/16/2023</u>



Addendum to Request for Advisory Opinion
City Manager's Office

A. The City of Birmingham has a robust system of volunteer boards and committees that make recommendations to the City Commission. Board and committee members may face a situation in which their personal and professional interests are in conflict or may give the appearance of conflict with the board on which they serve. Board and committee members are expected to disclose these conflicts of interest and recuse themselves from conversations and decisions on that item. Occasionally, situations may arise in which a member's professional interest is directly adversarial to their position as a board or committee member. For those situations, the City Manager's Office requests an advisory opinion on the following questions:

- *What is the appropriate action to take if a sitting appointee to a City board or committee is a fiduciary to an adversarial body?*
- *Is it appropriate for the City Commission to appoint or reappoint a person to a board or committee if they serve as a fiduciary to a body that is engaged in a lawsuit against said board or committee?*

B. Mr. Jason Canvasser has served on the Board of Zoning Appeals (BZA) since January 11, 2016 and applied for reappointment at the October 2, 2023 City Commission meeting. Mr. Canvasser is a partner with the law firm Clark Hill PLC that has an office located at 220 Park Street in Birmingham. On May 11, 2023, Clark Hill applied to the Board of Zoning Appeals requesting a dimensional variance for illuminated building signage. At the June 13, 2023 meeting, the BZA voted 3-4 to deny Clark Hill's request for a dimensional variance. Mr. Canvasser recused himself from the BZA's deliberation and vote on the appeal.

Following the denial, Clark Hill filed suit against the Board of Zoning Appeals in circuit court. That suit has not yet been resolved. Although Mr. Canvasser has a fiduciary interest in the outcome of the lawsuit against the BZA due to his position as a partner at Clark Hill, he is not working directly on the lawsuit.

Mr. Canvasser stated to the City Commission on October 2, 2023 that he would continue to recuse himself from all discussions regarding Clark Hill. While the City Commission expressed their appreciation for Mr. Canvasser's prior service to the BZA and confidence that he would recuse himself when necessary, they determined that it was prudent to ask for an advisory opinion from the Board of Ethics prior to reappointing Mr. Canvasser to the board.

C. The City of Birmingham Board of Ethics Complaint 2004-2 Decision determined that Mr. Roger Seeger violated the Ethics Ordinance by acting as a fiduciary to an account used to fund Mr. Gary Kulak's lawsuit against the City. In its decision, the Board of Ethics opined Mr. Seeger's actions "might result in or create the appearance of affecting adversely the confidence of the



public or the integrity of city government, and is incompatible and in conflict with the discharge of the volunteer's official duties." Although Mr. Canvasser is not playing a direct role in the lawsuit against the Board of Zoning Appeals, he does serve as a fiduciary to the adversarial party, Clark Hill, which may create the appearance of adversely affecting the public's confidence in the board.

ATTACHMENTS:

- Application by Jason Canvasser for City Board or Committee (BZA)
- Minutes from the City Commission meeting October 2, 2023
- Minutes from the Board of Zoning Appeals meeting June 13, 2023
- City of Birmingham Board of Ethics Complaint Decision 2004-02
 - Majority Opinion
 - Minority Opinion

APPLICATION FOR CITY BOARD OR COMMITTEE

Thank you for your interest in serving on a Board or Committee. The purpose of this form is to provide the City Commission with basic information about applicants considered for appointment. NOTE: Completed applications are included in the City Commission agenda packets. The information included on this form is open to the public. All Board and Committee members are subject to the provisions of the Ethics Ordinance (Chapter 2, Article IX of the City Code).

Information on various Boards and Committees and a list of current openings can be found on the City website at www.bhamgov.org/boardopportunities.

(Please print clearly)

Board/Committee of Interest Board of Zoning Appeals

Specific Category/Vacancy on Board Member (see back of this form for information)

Name Jason Canvasser

Phone 248-231-9972

Residential Address 369 Kimberly St.

Email * jcanvasser@clarkhill.com

Residential City, Zip Birmingham, MI 48009

Length of Residence 12 years

Business Address Clark Hill PLC, 500 Woodward Ave., Suite 3500

Occupation Attorney

Business City, Zip Detroit, MI 48226

Reason for Interest: Explain how your background and skills will enhance the board to which you have applied _____
I have sat on the BZA since approx. 2015. In my legal practice, I routinely help businesses and homeowners navigate complex zoning issues. As a resident of Birmingham, I am interested in continuing my service to the City by utilizing that knowledge to help regulate land use and act on questions relating to that use.

List your related employment experience Clark Hill PLC, June 1, 2012 through present.


List your related community activities Board of Directors - Birmingham Bloomfield Chamber of Commerce

List your related educational experience University of Michigan - BA, Political Science 2003; Wayne State Law School - JD, 2006

To the best of your knowledge, do you or a member of your immediate family have any direct financial or business relationships with any supplier, service provider or contractor of the City of Birmingham from which you or they derive direct compensation or financial benefit? If yes, please explain: No.

Do you currently have a relative serving on the board/committee to which you have applied? No

Are you an elector (registered voter) in the City of Birmingham? Yes


Signature of Applicant

9/27/2023
Date

Return the completed and signed application form to: City of Birmingham, City Clerk's Office, 151 Martin, Birmingham, MI 48009 or by email to clerk@bhamgov.org or fax to 248.530.1080. Updated 11/18/2020

**By providing your email to the City, you agree to receive news & notifications from the City. If you do not wish to receive these messages, you may unsubscribe at any time.*

Please consult the criteria required to be a member of each City Board or Committees. Fill in the criteria you meet in the "Specific Category/Vacancy on Board" on the Application. If you are applying for a spot as an Alternate Member, you must still meet at least one of the criteria. Please contact the Clerk's Office, at 248-530-1880 or clerk@bhamgov.org with any questions.

ADVISORY PARKING COMMITTEE

- Building Owner within the Parking Assessment District
- Restaurant owner within the Parking Assessment District
- Representative of a professional firm within the Parking Assessment District

ARCHITECTURAL REVIEW COMMITTEE

- Licensed architect and resident of Birmingham

CABLECASTING BOARD

- Resident of Birmingham

ALTERNATE HEARING OFFICER

- Resident of Birmingham with legal, administrative or other qualifications that will aid in the performance of the duties.

HISTORIC DISTRICT STUDY COMMITTEE

- Clearly demonstrated interest in or knowledge of historic preservation.

HOUSING BOARD OF APPEALS

- Education or experience in building construction administration, social services, real estate, or other such positions.

MULTI-MODAL TRANSPORTATION BOARD

- Urban planning, architecture or design education and/or experience.

MUSEUM BOARD

- Resident of Birmingham.

PARKS AND RECREATION BOARD – ALTERNATE MEMBER

- Registered to vote in Birmingham.

PUBLIC ARTS BOARD

- Represent a major cultural institution, be a Michigan registered architect, an artist, an art historian, or art consultant.

TRIANGLE DISTRICT CORRIDOR IMPROVEMENT AUTHORITY

- Ownership or business interest in property located in the Development Area.

Birmingham City Commission Minutes
October 2, 2023
Municipal Building, 151 Martin
7:30 p.m.
Vimeo Link: <https://vimeo.com/870466920>

I. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Therese Longe, Mayor, opened the meeting with the Pledge of Allegiance.

II. ROLL CALL

City Clerk Bingham called the roll.

Present: Mayor Longe
Mayor Pro Tem McLain
Commissioner Baller
Commissioner Boutros
Commissioner Haig
Commissioner Host
Commissioner Schafer

Absent: None

Staff: Assistant City Manager Fairbairn; Assistant City Manager Mark Clemence, City Clerk Bingham, City Engineer Coatta, Planning Director Dupuis, Parking Services Manager Ford, City Attorney Gojcaj

III. PROCLAMATIONS, CONGRATULATORY RESOLUTIONS, AWARDS, APPOINTMENTS, RESIGNATIONS AND CONFIRMATIONS, ADMINISTRATION OF OATHS, INTRODUCTION OF GUESTS AND ANNOUNCEMENTS

Announcements

- Happy Birthday Commissioner Haig
- The second annual Birmingham Art Walk is October 12, 2023, from 5-8 p.m. This free strolling event will feature local artists and shops, entertainment and more throughout downtown Birmingham! Stop by participating merchants to meet local artists and enjoy special promotions. For more information visit allinbrimingham.com.
- Next Saturday, October 14, from 1-4 p.m., the Birmingham Fire Department will be hosting their annual open house. The day will be filled with many fire education opportunities, including a live vehicle extrication demonstration. This kid-friendly event will have face painting, popcorn, hot dogs, firehouse chili, and much more. The open house will take place at Station 1, located at 572 S. Adams Rd.
- Proclamation in recognition of Robert S. Kenning's 100th birthday on September 20, 2023

Appointments

10-227-23 Board of Zoning Appeals

Kevin D. Hart was interviewed by the Commission.

MOTION: Nomination by MPT McLain:

To appoint Kevin D. Hart as a regular member to the Board of Zoning Appeals to serve a three-year term to expire October 10, 2026.

VOICE VOTE: Ayes, MPT McLain
Commissioner Host
Mayor Longe
Commissioner Haig
Commissioner Boutros
Commissioner Schafer
Commissioner Baller
Nays, None

Board of Zoning Appeals

Jason Canvasser was interviewed by the Commission.

Given that Mr. Canvasser serves as an equity partner in a firm presently in a legal dispute with the City, his reappointment was postponed pending an advisory opinion from the Board of Ethics.

It was stated that the City Manager's Office would file a request for an advisory opinion with the City Clerk.

Commissioner Haig clarified that the advisory opinion would be regarding the situation, and not regarding Mr. Canvasser himself.

The Commission and CA Gojcaj confirmed.

Commissioner Baller asked that the Board of Ethics clarify whether Mr. Canvasser would be permitted to serve after the resolution of the present legal dispute.

The Mayor noted that Mr. Hart would be sworn in in-person at a later date.

EMPLOYEE RECOGNITION

- City Clerk's Office
 - Megan Trapp (postponed)

IV. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA

David Bloom made a comment supporting more detail in the minutes.

V. CONSENT AGENDA

10-228-23 Consent Agenda

The following items were pulled from the Consent Agenda:

Commr. Haig:	Item L – Set a Public Hearing to amend Chapter 126 (Zoning), Article 2, Section 2.37 and Article 5, Section 5.12 to allow health club/studio uses in the B4 Business Residential District in the basement levels and floors two and above
MPT McLain:	Item D – Warrant List – September 21, 2023
Public:	Item B – City Commission Minutes of September 11, 2023
Commr. Baller:	Item K – Reduction of Advisory Parking Committee

MOTION: Motion by Commissioner Boutros, seconded by Commissioner Host:
To move the Consent Agenda excluding Items B, D, K, and L.

ROLL CALL VOTE: Ayes, MPT McLain
Commissioner Host
Mayor Longe
Commissioner Haig
Commissioner Schafer
Commissioner Boutros
Commissioner Baller

Nays, None

- A. Resolution to approve the City Commission Workshop meeting minutes of September 11, 2023.
- C. Resolution to approve the City Commission meeting minutes of September 18, 2023.
- E. Resolution to approve the warrant list, including Automated Clearing House payments, dated September 28, 2023, in the amount of \$1,340,637.27.

Birmingham Board Of Zoning Appeals Proceedings
Tuesday, June 13, 2023
City Commission Room
151 Martin Street, Birmingham, Michigan

1. Call To Order

Minutes of the special meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, June 13, 2023. Chair Morganroth convened the meeting at 7:30 p.m.

2. Rollcall

Present: Chair Erik Morganroth, Vice Chair Jason Canvasser; Board Members Kevin Hart Richard Lilley, John Miller, Ron Reddy, Pierre Yaldo; Alternate Board Member Carl Kona

Absent: None

Staff: Building Official Johnson; Senior Planner Cowan, City Transcriptionist Eichenhorn, Assistant Building Official Zielke

Chair Morganroth welcomed those present and reviewed the meeting's procedures. He noted that the members of the Board of Zoning Appeals are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quasi-judicial board and sit at the pleasure of the City Commission to hear appeals from petitioners who are seeking variances from the City's Zoning Ordinance. Under Michigan law, a dimensional variance requires four affirmative votes from this board, and the petitioner must show a practical difficulty. A land use variance requires five affirmative votes and the petitioner has to show a hardship. He pointed out that this board does not make up the criteria for practical difficulty or hardship. That has been established by statute and case law. Appeals are heard by the board as far as interpretations or rulings. In that type of appeal the appellant must show that the official or board demonstrated an abuse of discretion or acted in an arbitrary or capricious manner. Four affirmative votes are required to reverse an interpretation or ruling.

Chair Morganroth took rollcall of the petitioners. All petitioners were present.

3. Announcements

Announcements can be found in the evening's agenda packet.

4. Approval Of The Minutes Of The BZA Meetings Of May 9, 2023

T# 06-26-23

Motion by Mr. Lilley

Seconded by Mr. Yaldo to approve the minutes of the BZA meeting of May 9, 2023 as submitted.

Motion carried, 7-0.

VOICE VOTE

Yeas: Hart, Canvasser, Miller, Reddy, Lilley, Morganroth, Yaldo

Nays: None

5. Appeals

T# 06-27-23

**1) 185 Oakland
Appeal 23-17**

SP Cowan presented the item, explaining that the owner of the property known as 185 Oakland Ave was requesting the following variances:

- A. Chapter 126, Article 3, Section 3.09(B)(1)** requires that no less than 70% of the storefront/ground floor façade between 1 and 8 feet above grade shall be clear glass panels and doorway. The applicant is proposing changes to the façade facing Oakland Ave that will result in a glazing percentage of 51.5% (300.29 square feet); therefore, a variance of 18.5% (107.81 square feet) is being requested.
- B. Chapter 126, Article 3, Section 3.09(B)(1)** requires that no less than 70% of the storefront/ground floor façade between 1 and 8 feet above grade shall be clear glass panels and doorway. The applicant is proposing changes to the façade facing Ferndale Ave that will result in a glazing percentage of 59.5% (472.89 square feet), therefore a variance of 10.5% (83.4 square feet) is being requested.

Staff answered informational questions from the Board.

Russ Hinkle, architect, reviewed the letter describing why these variances were being sought. The letter was included in the evening's agenda packet.

In reply to Board inquiry, Mr. Hinkle explained:

- Since the glazing would be changing, it would more beneficial to leave the sill as-is in order to avoid exposing the backs of the desks to the sun; and,
- The landlord was undertaking the project and was attempting impact the tenant as little as possible. The landlord was aiming to avoid asking the tenant to change the interior layout of the office.

Motion by Mr. Reddy

Seconded by Mr. Lilley with regard to Appeal 23-17, Chapter 126, Article 3, Section 3.09(B)(1) requires that no less than 70% of the storefront/ground floor façade between 1 and 8 feet above grade shall be clear glass panels and doorway. The applicant is proposing changes to the façade facing Oakland Ave that will result in a glazing percentage of 51.5% (300.29 square feet); therefore, a variance of 18.5% (107.81 square feet) is being requested; and, B. Chapter 126, Article 3, Section 3.09(B)(1) requires that no less than 70% of the storefront/ground floor façade between 1 and 8 feet above grade shall be clear glass panels and doorway. The

applicant is proposing changes to the façade facing Ferndale Ave that will result in a glazing percentage of 59.5% (472.89 square feet), therefore a variance of 10.5% (83.4 square feet) is being requested.

Mr. Reddy moved to approve the variance requests for both A and B and tied approval to the plans. He said the appellant articulated straightforward reasons explaining why it would be an unreasonable burden to modify the windowsills. He noted the building was pre-existing non-conforming and that the appellant made efforts to increase compliance with the ordinance.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Hart, Canvasser, Miller, Reddy, Lilley, Morganroth, Yaldo

Nays: None

T# 06-28-23

**2) 1511 E. Maple Road
Appeal 23-19**

ABO Zielke presented the item, explaining that the owner of the property known as 1511 E. Maple Road was requesting the following variance to construct a rear addition to the existing nonconforming house:

- A. Chapter 126, Article 4, Section 4.74(C)** of the Zoning Ordinance requires that the minimum distance between principal residential buildings on adjacent lots of 14.00 feet or 25% of total lot width, whichever is larger. The required is 20.00 feet on the east side. The proposed is 17.20 feet. Therefore, a variance of 2.80 feet is being requested.

Staff answered informational questions from the Board.

Jason Hurst, co-owner, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

In reply to the Board, Mr. Hurst explained that while they explored stepping the wall of the second floor in, and were advised not to given load-bearing and cost concerns.

Motion by Mr. Hart

Seconded by VC Canvasser with regard to Appeal 23-19, A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum distance between principal residential buildings on adjacent lots of 14.00 feet or 25% of total lot width, whichever is larger. The required is 20.00 feet on the east side. The proposed is 17.20 feet. Therefore, a variance of 2.80 feet is being requested.

Mr. Hart moved to approve the variance request and tied approval to the plans as submitted. He said the appellant presented a reasonable request, that the pre-existing non-conforming portion of the home would not be affected, that there would be little effect on the neighboring properties, that the existing condition was not self-

created, and that approval would do substantial justice to the owner and the neighboring properties.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Hart, Reddy, Lilley, Yaldo, Morganroth, Canvasser, Miller

Nays: None

**3) 220 Park
Appeal 23-20**

VC Canvasser recused from the item citing a professional relationship with the appellant and exited the meeting at 8:01 p.m. Mr. Kona served for the hearing of this item in light of VC Canvasser's recusal.

SP Cowan presented the item, explaining that the owner of the property known as 220 Park was requesting the following variance to install two illuminated building identification signs:

- A. Chapter 86, Article 1, Section 1.05 (K)(2)** of the Sign Ordinance permits non-illuminated signs identifying the entire structure by a building name to be permitted above the first floor. The applicant is proposing two illuminated building identification signs at 18.3 square feet each (36.6 square feet total). Therefore, the applicant is requesting a dimensional variance of 36.6 square feet of illuminated building identification signage.

Staff answered informational questions from the Board.

Dan Minkus, Managing Partner of the Birmingham location of Clark Hill, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

In reply to the Board, Mr. Minkus said:

- The signage design was an effort to distinguish Clark Hill from the other signage on the building;
- He did not believe that the 220 Park sign was an illuminated sign. He noted that upcoming changes to the sign might include illumination;
- This outcome of this case should not be considered precedential because each case should be considered on its own merits;
- Their hardships were related to wayfinding, having to move from their previous office, and a desire for increased recognition; and,
- If it were in the sign band, a south-facing sign might not be visible to northbound traffic on Woodward due to the location of Hunter House Hamburgers. On the east facade, the building is indented which might also obscure the signage from view; and,
- The building was not unique in regards to most of the other buildings in the City.

Motion by Mr. Miller

Seconded by Mr. Lilley with regard to Appeal 23-20, A. Chapter 86, Article 1, Section 1.05 (K)(2) of the Sign Ordinance permits non-illuminated signs identifying the entire

structure by a building name to be permitted above the first floor. The applicant is proposing two illuminated building identification signs at 18.3 square feet each (36.6 square feet total). Therefore, the applicant is requesting a dimensional variance of 36.6 square feet of illuminated building identification signage.

Mr. Miller moved to approve the variance request and tied approval to the plans as submitted. He said a variance would do substantial justice to this particular petitioner. He said the building was in a unique location on Woodward, and noted that many nearby buildings had signage above the current limit. He noted that the lighting would be soft and unobtrusive due to its use of LED lighting. He said the request was reasonable due to the location of the building.

The Chair said that while he appreciated the appellant's presentation, the ordinance did not allow lighting based on the level, softness, or type of lighting used. He noted that the appellant would be able to brand the building through an agreement with the landlord, and that lighting of the signage was not permitted in the ordinance. He noted that the sign could also be illuminated within the sign band. He said the appellant therefore had sufficient opportunity to maximize exposure and illuminate without a variance. He said he would not support the motion for that reason.

Mr. Kona concurred with the Chair. He noted the ordinance would permit the appellant to have both the signage on the third floor and a lit sign in the sign band. He said that would resolve any difficulties with trying to locate the building in the dark without a variance. He said he would not support the motion and that there was no justification for the variance.

Mr. Hart said he would support the motion. He noted that there are a number of challenges with multi-tenant buildings and identification. He said the lighting would be very subtle and that foot candles with LEDs are very difficult to measure. He noted that the sign would be indirect lighting. Given the challenges with the building, he said he would support the motion.

The Chair noted it was not within the Board's purview to change the ordinance. He noted the appellant could petition the Commission if they believed the ordinance should be changed in regards to the lighting of signs. He said he did not hear anything from the appellant that established a practical difficulty.

Mr. Yaldo said it was his understanding that in order to grant a variance the difficulties faced by the appellant needed to be relatively unique to that appellant. He noted there were many other buildings along Woodward, and asked what would prevent those buildings from requesting the same variance. He said there were no particularly unique features of the building relative to other buildings along Woodward, and said he was concerned the Board would be varying from the standards it was required to vote on if the variance were granted.

Mr. Miller said there were not many buildings on Woodward, which made this building unique. He also opined that it was the Board's responsibility to do what was reasonable, even if it was beyond the ordinance. He noted that anyone requesting a

signage variance would have to have their appeal reviewed by the Board, and that the Board would determine whether a request was reasonable or unreasonable. He noted the sign was neither large nor bright, and that the building was relatively unique given its location. He said that any building on Woodward became a somewhat unique situation compared to other buildings within the City. He said that was why he found the appellant's request to be reasonable.

Motion failed, 3-4.

ROLL CALL VOTE

Yeas: Hart, Lilley, Miller

Nays: Morganroth, Reddy, Kona, Yaldo

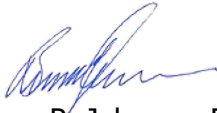
VC Canvasser rejoined the meeting at 8:31 p.m.

6. Correspondence

7. Open To The Public For Matters Not On The Agenda

8. Adjournment

No further business being evident, the Board motioned to adjourn at 8:32p.m.



Bruce R. Johnson, Building Official



Laura Eichenhorn, City Transcriptionist

**CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2004-02**

DECISION

June 8, 2004

I. ISSUES PRESENTED

A. Is it a violation of the City of Birmingham's Ethics Ordinance for a volunteer member of a city board to advocate on behalf of a person who has brought a lawsuit against the city and certain of its officials and to solicit the donation of funds for the purpose of defraying the expense of that lawsuit?

Answer: It is not. A volunteer member of a city board may advocate on behalf of a person who has brought a lawsuit against the city and certain of its officials and may solicit the donation of funds for the purpose of defraying the expense of that lawsuit. To the extent that the city's Ethics Ordinance as presently drafted can be interpreted to prohibit such activity, that prohibition is barred by First Amendment principles.

B. Is it a violation of the City of Birmingham's Ethics Ordinance for a volunteer member of a city board to be the signatory to or a fiduciary of a bank account the use of which is dedicated solely to funding another person's lawsuit against the city?

Answer: It is. A volunteer member of a city board may not, consistent with the Ethics Ordinance, be the signatory to or a fiduciary of a bank account the use of which is dedicated solely to funding another person's lawsuit against the city. In becoming a signatory to or a fiduciary of such an account, the volunteer assumes a role directly against the interests of the city. That 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 in or create the appearance of affecting adversely 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. It is not protected under First Amendment principles.

II. OPINION

This matter came to the Board of Ethics on a complaint filed by Ms. Dorothy Conrad, a resident of the City of Birmingham, as Complainant, against Mr. Ralph L. Seger, Jr., also a resident of the city, as Respondent. The complaint alleges that Mr.

Seger has violated various portions of sections 2-320 to 2-324 of the city's Ethics Ordinance.

The Board of Ethics is an advisory body created by the City Commission to interpret the Ethics Ordinance. Birmingham Code of Ordinances, § 2-325(a)(1). The Board is required to determine whether the Respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the Ethics Ordinance. Board of Ethics Rule 314. The Board is to make its decision upon a vote of a majority of its members based upon the evidence in the record and controlling law. *Id.* The Board must issue its decision in the form of a written opinion. *Id.*

The City Clerk gave appropriate notice to the parties and scheduled the matter to be heard at the Board's regular April 6, 2004 meeting. The Respondent did not file a written answer to the complaint ahead of the hearing, nor was he required to, but he appeared in person on April 6 to defend.

On March 4, 2004, the City Attorney wrote to the Respondent informing him of his right to have the matter heard in open, public session or in closed, private session. On March 8, 2004, the Respondent notified the City Attorney of his election to proceed in open session. In that same letter, the Respondent requested that city employees Thelma Golden, Lauren Wood and Robert J. Fox be present to testify on his behalf.

At its regular meeting on April 6, 2004, the Board convened in open session to consider this matter. The Complainant and the Respondent appeared before the Board, made opening statements, offered evidence, and presented closing statements. Documents presented included the complaint and its exhibits and Mr. Seger's written response. The witnesses included Ms. Conrad; Mr. Seger; Ms. Thelma Golden, City Treasurer; Mr. Donald Carney, who is Mayor of the City of Birmingham but who appeared in his private capacity; Ms. Lauren Wood, Staff and Services Manager within the Department of Public Services; and Mr. Robert J. Fox, Assistant Director of Public Services. The Board also received public comment from two city residents, Mr. George Stern and Mr. Tom Elliott.

Mayor Carney later raised the question of whether city policy permitted or prohibited his testimony, even though he had testified that he was appearing in his private, not public, capacity. After the City Attorney considered the question, Mayor Carney concluded that under City Resolution No. 1261, he should not have testified.¹ He informed the City Attorney of his conclusion in that regard, who in turn informed the Board and the parties before the Board's deliberations at its May 4, 2004 meeting. At that meeting, the Board asked the parties whether they had an objection to striking and disregarding Mayor Carney's testimony. Neither the Complainant nor the Respondent

¹ "No elected or appointed official should appear before any City board or commission as counsel or advocate for any party participating in any proceedings before such board or commission, whether he is being paid for his services or not." Statement of Policy of Birmingham City Commission, City Resolution No. 1261 (August 5, 1968).

objected. Moreover, Mayor Carney's testimony was cumulative of testimony and argument presented by the Respondent. Accordingly, his testimony was struck and is disregarded by the Board in its consideration of this matter. The Board thanks Mayor Carney for timely raising the question of his disqualification from testifying in this matter.

After receiving the evidence and the argument of the parties on April 6, 2004, the Board reconvened at its next regular meeting on May 4, 2004, where it deliberated and voted on the matter. As a result of the vote, the Board issues this opinion as its final decision in this case. The Respondent raised a defense based upon constitutional law as well as defenses based upon the facts. Because the constitutional defense is substantial, the Board addresses it in this opinion. To facilitate the process, the Board issues this opinion in the form of findings of fact, conclusions of law and discussion.

A. FINDINGS OF FACT.

The relevant facts are not in dispute. Mr. Seger forthrightly admitted that the facts as alleged in the complaint are true.

Mr. Seger serves on two city advisory committees. He is a member of the General Investment Committee, and he is chairperson of the Barnum Center Steering Committee. He serves in those positions by appointment of the Birmingham City Commission. He is a volunteer to the city, not a paid employee.

The General Investment Committee is a citizen advisory committee created to provide technical investment assistance to the City Treasurer and to provide an additional periodic professional review of the city's general investment portfolio. Its mandate is to assist the City Treasurer in determining the types of investments which are most appropriate within the investment policy approved by the City Commission and to report annually to the City Commission on investment performance. City Resolution No. 04-328-85 (April 1, 1985). Members of the General Investment Committee are included under the city's fiduciary liability insurance policy. *Id.*

As a member of the General Investment Committee, Mr. Seger is involved in making recommendations to the city and the city's treasurer about investment policy, including the investment of surplus funds that may be used for general city purposes, as may be in the best interests of the city. Among other things, these unrestricted funds may be used to defray the city's litigation expense and satisfy judgments or fund settlements of lawsuits against the city. The General Investment Committee does not recommend specific investments. Rather, it advises the city on the types of investments available, approves a list of brokers the city might employ, and confers on general investment policy as a guideline for use by the City Commission. The General Investment Committee meets quarterly. Its most recent meeting before the Board's April 6 hearing was sometime in the middle of January 2004. The General Investment Committee is governed by the city's General Investment Policy, as approved by the City Commission

on September 8, 2003. Section 6.0 of the General Investment Policy addresses ethics and conflicts of interest specific to that committee. Mr. Seger considers himself bound by the requirements of that section.²

The Barnum Center Study Committee is an ad hoc citizen advisory committee created to advise the city on the use of the property that formerly was Barnum Junior High School and, more recently, owned by William Beaumont Hospital. Its mandate is to gather data, develop an acceptable plan for the interim and long-term public use of the Barnum facility, and make recommendations to the Department of Public Services and ultimately the City Commission.

As chair of the Barnum Center Study Committee, Mr. Seger is involved with making recommendations to the city about the Barnum property, including recommendations about a consultant to advise on its potential uses. The Barnum Center Study Committee usually meets monthly. According to published minutes, it met on December 11, 2003 and January 8 and February 26, 2004.

The complaint commencing this matter arises out of Mr. Seger's efforts on behalf of Mr. Gary Kulak. Mr. Kulak is a former member of the City of Birmingham's Planning Board and Barnum Center Study Committee. On January 26, 2004, Mr. Kulak was removed from those bodies by action of the Birmingham City Commission. On January 29, 2004, he filed a lawsuit in the United State District Court for the Eastern District of Michigan against the city and certain of its elected officials, alleging that the city wrongfully removed him. His lawsuit sought both money damages and injunctive relief. The federal court denied his motion for injunctive relief and dismissed the action. Mr. Kulak then filed suit in the Oakland County Circuit Court.

Approximately one week before Mr. Kulak's removal by the City Commission, Mr. Seger and two other individuals, Ms. Denise Grzech and Ms. Denise McKewan, formed a group to raise funds to help Mr. Kulak defray the cost of his lawsuit against the city. Mr. Kulak, Ms. Grzech and Ms. McKewan established with Midwest Guaranty Bank an account called the Gary Kulak Legal Defense Fund ("the Kulak Fund"). Each of the three individuals is a signatory to the account, and two of them must sign any check drawn on it. To establish the account, the three obtained from the Internal Revenue Service a taxpayer identification number. They did not incorporate, and they made no other filing with a governmental agency.

² Section 6.0 of the city's General Investment Policy requires, among other things, that officers and employees in the investment process refrain from personal business activity that could conflict with proper execution of the investment program or that could impair their ability to make impartial investment decisions. City of Birmingham, General Investment Policy, § 6.0 (Sept. 8, 2003). As mentioned before, Mr. Seger considers himself bound by this policy, but the Board does not undertake to decide whether he acted in conformity with it because no violation was alleged in the complaint and the Board did not address or consider it during the hearing.

The Kulak Fund bank account was established and used for a sole, restricted purpose. Monies deposited into the account may be spent only to defray expenses incurred relative to Mr. Kulak's lawsuit against the city. Mr. Seger considers himself a fiduciary of the Kulak Fund account, and the Board finds that he is a fiduciary.

Mr. Seger personally solicited and received monies on behalf of Mr. Kulak and deposited those monies into the Kulak Fund bank account. He also deposited checks he received via Mr. Kulak from others. Mr. Seger made payments from the Kulak Fund account in furtherance of the lawsuit.

Mr. Seger also participated in a written solicitation for contributions to the Kulak Fund. With Mr. Seger's knowledge, this solicitation was incorporated into an e-mail distributed to a number of Birmingham area citizens by Mr. Paul Reagan through a subscription called "bEline." The solicitation read:

Kulak Legal Defense Fund Established

Citizen voluteers [*sic*] are under attack by a commissioners [*sic*] indebted to the architects / commercial developers / and realestate [*sic*] speculators that financed their election. Gary Kulak represents an obstacle to the deal making and political spoils system that taken [*sic*] over City Hall. Gary's defense will be expensive. He needs your help.

Please send a check for a contribution to the "Gary Kulak Legal Defense Fund". There is no limit on the amount except the size of your purse and your heart. Mail checks to

Ralph Seger
1199 Pilgrim
Birmingham, MI 48009

This solicitation is the only written request for contributions that Mr. Seger made. Although the solicitation was styled as one in furtherance of the Gary Kulak Legal Defense Fund, Mr. Seger knows that Mr. Kulak is a plaintiff, not a defendant, in the litigation against the city.

Mr. Seger solicited contributions to the Kulak Fund from a number of individuals, some of whom themselves serve on city boards or committees. He did not, however, solicit contributions from the members or staff of the General Investment Committee or the Barnum Center Study Committee. It appears that the General Investment Committee did not meet between the time the Kulak Fund was established in mid-January 2004 and the Board's April 6 hearing.

Mr. Seger did not inform the General Investment Committee, the Barnum Center Study Committee, the City Treasurer or Ms. Wood that he was establishing the Kulak

Fund. The first time Ms. Wood heard that Mr. Seger had established the Kulak Fund was when she was requested to testify at the April 6 hearing. Mr. Kulak did not solicit donations to the Kulak Fund in the presence of Ms. Golden, Ms. Wood or Mr. Fox.

Mr. Seger is aware that the Ethics Ordinance allows city employees or board members to seek an advisory opinion from the Board of Ethics about whether their conduct conforms to the ordinance. He knew that his fellow General Investment Committee member, Mr. Peter Root, sought and obtained such an opinion on an unrelated topic in 2003.

Mr. Seger has performed a range of volunteer services, both directly for the City of Birmingham and for other organizations and causes, for many years. It is important to note that Mr. Seger's official conduct as a member of the General Investment Committee or the Barnum Center Steering Committee has not been called into question in this case. There is no evidence, indeed there has been no accusation or even suggestion, that he used his positions on those committees to gain favor for himself or for Mr. Kulak.

Given his role with the city, however, Mr. Seger's conduct with respect to the Kulak Fund is called into question under several provisions of the city's Ethics Ordinance. He conceded that his conduct in participating in the Kulak Fund may tend to undermine respect for city officials and employees and for the city as an institution.

B. CONCLUSIONS OF LAW AND DISCUSSION.

1. Jurisdiction.

The first question is jurisdictional: whether the Ethics Ordinance applies to Mr. Seger. He conceded that it does apply, and he is correct. The Ethics Ordinance defines "city official or employee" to include "persons who serve on advisory boards and commissions." Birmingham Code of Ordinances, § 2-322. Thus, Mr. Seger is a city official for purposes of the Ethics Ordinance and is subject to and bound by its provisions. Accordingly, the Board of Ethics has jurisdiction to determine the matter.

2. Constitutional Analysis of the Ethics Ordinance as Applied to Mr. Seger's Activities.

The Board must determine whether Mr. Seger's activities meet or violate the provisions of the Ethics Ordinance. But because one of Mr. Seger's defenses is that his activities are protected speech under First Amendment principles, the Board looks first to those principles to determine if they are dispositive of the case in his favor. Mr. Seger's constitutional defense is substantial, requiring the Board to interpret the Ethics Ordinance in light of First Amendment jurisprudence.

The freedom of speech embodied in the First Amendments to the U.S. Constitution and the Michigan Constitution enjoys important stature in American society. It is "the indispensable condition of nearly every form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937) (Cardozo, J.). Freedom of speech is not absolute, however. The government may validly restrict the time, place and manner of speech and may regulate, prohibit or punish certain speech, such as commercial speech, defamation, advocacy of violence, and obscenity. Ronald D. Rotunda & John E. Nowak, *TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE AND PROCEDURE* § 20.7 (3d. ed. 1999).

The constitutional jurisprudence most closely relevant to the instant matter involves the statutory prohibition of political activity undertaken by governmental employees. It has long been held that governmental employees may be prohibited from participating in political campaigns, including the solicitation of donations. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d. 830 (1973) (construing the Hatch Act); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d. 796 (1973). Indeed, Michigan has long prohibited certain governmental employees from soliciting or receiving political contributions. *See, e.g.*, Mich. Comp. Laws Ann. § 38.419 (county employees), § 38.465 (township employees). The Board notes, however, that, to be enforceable, restrictions on the political activity of governmental employees must not be vague or overly broad. Rather, they must be drawn sufficiently clearly so as to give the employees appropriate notice of the prohibited conduct and not drawn so broadly as to exceed the governmental purpose furthered by the restriction. *See generally, United States Civil Service Commission, supra.*

Certain activity, though characterized as speech or being related to speech, is held for constitutional purposes not to be speech at all but rather is conduct that may validly be regulated or even prohibited. *Virginia v. Hicks*, ___ U.S. ___, 123 S. Ct. 2191, 156 L. Ed. 2d. 148 (2003) (public housing agency may ban from low-income housing development a trespasser who sought to distribute leaflets); *Board of Trustees of the State of New York v. Fox*, 492 U.S. 469, 473, 109 S. Ct. 3028, 106 L. Ed. 2d. 388 (1989) (state university may prohibit Tupperware parties from residential dormitories even though such parties have a home economics (and thus speech) component as well as a commercial component).

Under this analysis, Mr. Seger's activities with respect to the Kulak Fund are separable into two categories: speech and conduct. Each category is accorded different constitutional protection.

Mr. Seger's advocacy on behalf of Mr. Kulak's cause, including his solicitation of contributions to the Kulak Fund, is speech. Under the facts presented and the language of the Ethics Ordinance, those activities are protected by the First Amendment. The Board does not decide the question of whether the city may validly regulate or prohibit Mr. Seger's speech under the facts presented, or even whether it should do so. Rather, the Board concludes that, although the Ethics Ordinance could be interpreted to prohibit Mr.

Seger from soliciting contributions to the Kulak Fund, its language is not sufficiently clear and narrow to withstand constitutional scrutiny. Thus, the Board finds that Mr. Seger's activities in advocating on behalf of Mr. Kulak's cause and in soliciting donations to support Mr. Kulak's litigation against the city do not constitute a violation of the Ethics Ordinance. On the other hand, Mr. Kulak's role as a signatory to and a fiduciary for the Kulak Fund bank account constitutes conduct, not speech, which may validly be prohibited by the city.

3. Analysis of Whether Mr. Seger's Role As a Signatory to and Fiduciary of the Kulak Fund Account Violates the Ethics Ordinance.

The sole purpose of the Kulak Fund is to support Mr. Kulak's litigation seeking the recovery of damages and injunctive relief against the city and certain of its officials. Mr. Seger admitted that he deemed himself a fiduciary of the Kulak Fund, and the Board concludes that he is a fiduciary. Furthermore, The Ethics Ordinance declares that public office is a public trust. Birmingham Code of Ordinances, § 2-320. The complaint alleges that Mr. Seger owes a fiduciary obligation to the city as well, and the Board so concludes. Thus, the Board concludes that Mr. Seger's activity as a signatory to and fiduciary of the Kulak Fund account constitutes a violation of the Ethics Ordinance, for several reasons presented below.

a. Violation of Section 2-320.

The Ethics Ordinance proscribes actions that are incompatible with the public interest. *Id.* § 2-320. It requires city officials or employees to avoid conflicts between their private interests and the public interest. *Id.* City officials or employees hold their positions in public trust, which they are required to honor by integrity and conduct. *Id.*

The Board holds that Mr. Seger violated section 2-320 of the Ethics Ordinance. His fiduciary role and his service as a signatory to the Kulak Fund account is incompatible with the public interest and results in an irreconcilable conflict between his private interest in supporting Mr. Kulak's cause against the city and the public interest. Mr. Seger's integrity is not at issue, and his advocacy on behalf of Mr. Kulak is not prohibited by section 2-320 under the facts presented, but his conduct in assuming a fiduciary responsibility directly against the interest of the city violates section 2-320.

b. Violation of Section 2-321.

Section 2-321 requires city officials or employees to avoid conduct which may tend to undermine respect for city officials and employees and for the city as an institution. Section 2-321 also requires city officials and employees to carry out their duties impartially and remain non-partisan in their official acts.

The Board finds no evidence, nor even an allegation, of partisanship in Mr. Seger's official acts. But Mr. Seger admitted, and the Board concludes, that his conduct tends to undermine respect for city officials and employees and for the city as an institution. The Board points out that the Kulak lawsuit is brought against both the city and certain of its elected officials.

c. Violation of Section 2-323.

Section 2-323(5) requires city officials or employees to avoid any action that might result in or create the appearance of affecting adversely the confidence of the public or the integrity of city government.

The Board concludes that Mr. Seger's service as a signatory to and fiduciary of the Kulak Fund account might result in or create the appearance of affecting adversely the confidence of the public or the integrity of city government. His role on a city committee could readily be compromised and his vote subjected to challenge were someone appearing before that committee to make a contribution to the Kulak Fund, even absent Mr. Seger's solicitation or knowledge. The risk of the appearance of adversely affecting the confidence of the public or the integrity of city government, even inadvertently, is a risk that the Ethics Ordinance holds the city is unwilling to assume under the facts of this case. The legality of Mr. Seger's conduct is not in question, but that is not relevant. Moreover, the substantiality of his conflict of interest or the perceived risk to the public's confidence in the city is not relevant. Indeed, the risk to the public's confidence was increased by Mr. Seger's failure to disclose his association with the Kulak Fund to the two city committees on which he serves.

d. No Violation of Section 2-324 (a)(4).

Section 2-324(a)(4) forbids a city official or employee to solicit any gift of money for the benefit of any other 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.

The Board concludes that Mr. Seger has not violated section 2-324(a)(4). Although Mr. Seger solicited and received gifts of money for the benefit of Mr. Kulak, there has been no showing that the gifts have influenced or even tend to influence the manner in which he has performed his official duties or any other officials or employees have performed their official duties.

e. Violation of Section 2-324 (a)(6).

Section 2-324(a)(6) forbids a city official or employee to render services for any private or public interest when that service is incompatible or in conflict with the

discharge of his or her official duties or may tend to impair his or her independence of judgment or action in the performance of his or her officials duties.

The Board concludes that Mr. Seger has violated section 2-324 (a)(6). His fiduciary role and his service as a signatory to the Kulak Fund account are, as a matter of fact and as a matter of law, incompatible and in conflict with the discharge of his official duties, which involve maximizing the financial resources of the city. Mr. Seger contended that, even if he is a fiduciary, he is a fiduciary only for a limited, private purpose. Thus, he contended, there is no conflict between his role in the Kulak Fund and his role in the city. He is incorrect. The first and paramount duty of a fiduciary is loyalty to the principal. *Stephenson v. Golden*, 279 Mich. 710, 276 N.W. 849 (1937). That loyalty must be absolutely undivided. *Cozzens v. Bazzani Building Co.*, 456 F. Supp. 192 (E.D. Mich. 1978). He cannot serve both interests consistent with the Ethics Ordinance. Moreover, the Ethics Ordinance makes no provision for substantiality of the conflict. Without regard to the content of his speech, Mr. Kulak's status as a fiduciary in a matter against the direct interest of the city is incompatible with his role as a city official or employee under the Ethics Ordinance.

4. Discussion of Other Defenses Asserted.

Mr. Seger asserted several defenses in addition to this constitutional defense. The Board rejects these defenses.

Mr. Seger asserted that his conduct in his official capacity on the two city committees on which he serves has been beyond reproach. The Board accepts that assertion, for there is evidence in the record to support it, and no evidence to the contrary has been presented. But, as stated above, that defense is irrelevant. Mr. Seger was not charged with any malfeasance or improper conduct while serving on the committees. What is at issue is his role in supporting Mr. Kulak's lawsuit by serving as a signatory to and fiduciary of the Kulak Fund account, the sole purpose of which is to fund litigation against the city.

Mr. Seger also asserted that his activity on behalf of the Kulak Fund is personal activity that is not subject to the Ethics Ordinance. He is incorrect. The ordinance explicitly addresses private activity and the need to balance, indeed sometimes subordinate, a volunteer's private interest with the interests of the city and the people. Birmingham Code of Ordinances, § 2-321.

Finally, Mr. Seger contended that the complaint submitted in this case is politically and personally motivated. The Board rejects that defense for three reasons. First, the defense is irrelevant. Mr. Seger admitted that the allegations of the complaint are true. Consequently, the veracity of the Complainant was not brought into issue at the hearing. Thus, her motivation in filing the complaint has no bearing on any fact of consequence to the determination of the matter.

Second, in enacting the Ethics Ordinance, the city has devised a way for the public to seek a determination of whether the conduct of its officials and employees meets the prescribed standard of conduct. The Board has jurisdiction to review that conduct, whether brought in the form of a complaint by a citizen, as in this case, or as a request by the official or employee for an opinion about his or her own conduct. The Complainant had the legal right to file the complaint. Moreover, had Mr. Seger been sensitive to the question of whether his conduct might violate the Ethics Ordinance, he himself could have requested from the Board an advisory opinion, a process that he admittedly knew existed, thereby avoiding the filing of the complaint altogether.

Third, the Board concludes as a matter of fact that there is insufficient basis to demonstrate that the complaint was politically or personally motivated. Mr. Seger accused the Complainant of filing the complaint out of personal animus. He was correct in arguing that the Ethics Ordinance is not to be used to settle personal or political scores. But he did not demonstrate animus on the part of the Complainant. Rather, the animus demonstrated in the record appears to be Mr. Seger's animus towards the Complainant. The Board specifically rejects Mr. Seger's irrelevant, misleading, unjustified, and disrespectful *ad hominem* attack against the Complainant.

5. Recommendations.

The Board is vested with the authority to determine whether the Respondent's conduct conforms to the Ethics Ordinance. The Board is not empowered to prescribe a sanction or penalty, nor does it undertake to do so, but instead leaves that consideration to the City Commission as the ordinance prescribes.

Because the Board has an advisory function, however, it customarily recommends ways in which city officials and employees can meet the requirements of the ordinance. In his written submission to the Board, Mr. Seger indicated that he could either recuse himself from the matter before the General Investment Committee or the Barnum Center Steering Committee or terminate his association with the Kulak Fund. In the opinion of the Board, because his conflict is one of status, he may cure the conflict only by resigning from the committees or from the Kulak Fund. For purposes of advising similarly situated volunteers, the Board holds that, at the time he assumed his role with the Kulak Fund, he should have informed the General Investment Committee and the Barnum Center Steering Committee so that its members could have taken that factor into account during their consideration of the matters before them. He should not have participated in any discussions or decisions of those bodies until he disclosed his association with the Kulak Fund and the question of compliance with the Ethics Ordinance was decided.



James D. Robb



John J. Schret, Jr.

Ms. Fierro-Share submitted a dissenting opinion.

Sophie Fierro-Share

CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2004-02
MINORITY OPINION
JUNE 8, 2004

I agree with my colleagues' decision that a city board member may advocate on behalf of a person who has brought a lawsuit against the city and certain of its officials. I write separately because I do not agree with my colleagues' decision that it is a violation for a volunteer member of a city board to be a signatory to or a fiduciary of a bank account established to pay the cost of litigation against the city. My colleagues find a violation of four separate sections of the Ethics Ordinance on very narrow grounds. I think they place too much importance on a distinction without a practical difference. More importantly, the way they approach the problem takes more responsibility for judging individual personal conduct than the Ethics Board was meant to have.

My colleagues conclude that Mr. Seger violates Section 2-324(a)(6) because his fiduciary responsibility to the Kulak Defense Fund is inconsistent with his duty as a member of the General Investment Committee, which they characterize as "involving maximizing the financial resources of the City". When I examine the real duties in Mr. Seger's public and private roles, I do not see the conflict.

My colleagues acknowledge that Mr. Seger's duties as a signatory on the Kulak Fund bank account are to see that the funds are spent only to pay expenses for which they were donated. This is a very limited duty that has no involvement with any of Mr. Seger's official duties. I believe my colleagues correctly summarize his duty in their findings. They note that as a member of the General Investment Committee, Mr. Seger is to "assist the City Treasurer in determining the types of investments which are most appropriate within the investment policy approved by the City Commission, and to report annually to the City Commission on investment performance". In the Barnum Study Committee, he is part of a group which is to "gather data, develop an acceptable plan for the interim and long term public use of the Barnum facility, and make recommendations to the Department of Public Services, and ultimately the City Commission." Neither of these tasks "involve maximizing the financial resources of the City". In either case, Mr. Seger could properly advocate policies that give up the possibility of making additional money to serve a more important purpose, such as preservation of capital or free public use of the Barnum Center.

I do not believe that the duty to see that privately donated funds are spent for the purpose for which they were donated creates a conflict of interest with the advice Mr. Seger gives the City Treasurer or the data he gathers or recommendations he wants to make as a member of the Barnum Study Committee. Section 2-324(a)(10) lists those situations where a conflict of interest exist. None apply to this circumstance. Mr. Seger has no financial or personal interest in the outcome of the Mr. Kulak's lawsuit against the City. Whether Mr. Kulak wins or loses, Mr. Seger's conduct does not violate any other of Michigan's conflict of interest laws.

My colleagues agree that the Ethics Ordinance cannot properly be read to prohibit Mr. Seger from advocating Mr. Kulak's cause or soliciting funds.¹ By the same logic, Mr. Seger, like any public official, would not violate the Ordinance by urging Mr. Kulak to file or to pursue that suit.

My colleagues say that assuring that restricted funds are used only for the purpose donated is incompatible with the public interest under Section 2-320; tends to undermine respect for City officials, City employees and the City as an institution under Section 2-321; and might result in or create the appearance of affecting adversely the confidence of the public or the integrity of the City government under Section 2-323.

I think this analysis ignores the higher purpose of the Ordinance. This Ordinance could be interpreted in various ways. If Board members base their decisions on their personal view of whether conduct violates the spirit of the Ordinance, the Ethics Board could end up being the judge of propriety in every local political dispute. In my opinion, more appropriately, the Board should keep its focus on the higher purpose of the Ordinance by applying well-accepted community norms, mores and standards, and not personal opinion, to the broad, general statements of Sections 320, 321 and 323 of the Ethics Ordinance. I think saying a check signer is unethical under the general standards of the Ordinance, but advocating in favor of Mr. Kulak's lawsuit is not, crosses the line between personal judgment and community norms. I do not believe the community at large will see this as a distinction that makes a difference. The question is not whether I or any other Board member thinks it is a good idea to be a signer of a check for a legal defense fund while serving on a City board. The issue is whether it is so contrary to our community's consensus that it is incompatible with the public interest,

¹ My view of this would be different if Mr. Seger offered to take some official act in exchange for a contribution to the Fund. There is no allegation that anything like this occurred.

undermines respect for City officials or adversely impacts public confidence in the integrity of City government.

The issue before us clearly arises from a political dispute within the City. There are citizens of Birmingham who believe that Mr. Kulak was properly removed from the Planning Commission, and there are those who believe it was wrong of the City Commission to remove him. We cannot ignore the fact that the peripheral issues which may be generated by any political dispute will also create a political disagreement. Some may believe filing a court action to establish Mr. Kulak's rights is proper, and some may believe it is not. Some may believe filing one court action is proper, but filing a second is not. Some may believe that City volunteers who disagree with the decision of the City Commission must choose between continued service, or silence and inactivity, while others may think the best interest of the City is in encouraging City volunteers to express their views in every and any forum, even if those views are unpopular. The point is that there is not a community consensus on the main subject, much less the narrower question of whether a member serving on a City Board may be one of three check signers on an account whose sole purpose is to pay legal expenses for a case that some significant segment of the population believes is lawful to bring.

My colleagues have rendered judgment that the mere fact that Mr. Seger is a signatory on a restricted account used to pay legal expenses for a lawsuit against the City undermines respect for City officials and for the City as an institution (Section 2-321), and might result in or create the appearance of affecting adversely the confidence of the public or the integrity of City government (2-323). They also have determined that there is an "irreconcilable conflict between his private interest in supporting Mr. Kulak's cause against the City and the public interest" in violation of Section 2-320.

I do not believe that the Ethics Ordinance empowers the Ethics Board to make such sweeping judgments based upon such broadly-descriptive language in the absence of a violation of the more narrowly-tailored provisions of Sections 2-324 unless when the conduct involves a clear violation of a widely-accepted community norm. Without this type of restraint, the Ethics Board may find itself dragged into a whole series of political issues in the future with undesirable consequences. Section 2-324 lays out in quite specific detail what constitutes a conflict of interest. Before concluding that some conduct undermines respect or may adversely affect the confidence of the public, we must be absolutely certain that we reflect the community consensus,

not our own personal opinion. Yes, there are undoubtedly situations where the Ethics Board can properly venture into this territory. But this is not one of them. I do not see how a member of the General Investment Committee or the Barnum Study Committee violates the Ethics Ordinance by signing checks from donated money to pay the expenses of a lawsuit which the Ethics Ordinance does not forbid him from supporting, or apparently from bringing himself. I fear most people will not understand the distinction either, and will conclude that the Ethics Board is setting a precedent of judging which political activities are acceptable, and which are not based on our own personal opinions, or who holds the majority on the City Council or a civic board at any given time.

The citizens of Birmingham are strong enough in their commitment to democracy to accept that City affairs generate disagreement and that there are a variety of places to express that disagreement. We are more likely to undermine respect for the City as an institution or adversely affect public confidence by creating a precedent which causes the public to believe the Ethics Board is a political body.



SOPHIE FIERRO-SHARE



Case No. _____
(Assigned by clerk)

ETHICS INCIDENT/COMPLAINT FORM

Any person who has a complaint against a city official or employee, as defined in the Code of Ethics, alleging that conduct of that official or employee is in breach of the code, may bring the matter before the Birmingham Board of Ethics by filing this form with the city clerk. Within seven days upon receipt of this filing, the clerk will set a hearing for this matter and notify the parties involved according to the ordinance.

All advisory opinions will be communicated to the city commission and will be published on the city's website at www.bhamgov.org.

Written requests are subject to disclosure under the Freedom of Information Act.

- 1. Name the person alleged to have violated one or more provisions of the City of Birmingham's Ethics Ordinance (Chapter 2, Article IX), and provide the following information, if known. If you are alleging that more than one person may have violated the City of Birmingham's Ethics Ordinance, file a separate complaint form for each individual. The information on this form may be subject to disclosure under the Freedom of Information Act.

Name Therese Longe Phone Number (248) 530-1800

Address 1253 Yosemite Blvd. Birmingham MI 48009
(Number, Street, City, State, Zip)

Position or Board City Commissioner/ Mayor

- 2. Explain why you believe that the individual named above may have violated the City of Birmingham's Ethics Ordinance. Be as specific as possible as to dates, times, places, and actions. Attach additional sheets of paper if the space provided below is not sufficient. Also note which specific section in the ordinance was violated.

See attachment **ETHICS INCIDENT / COMPLAINT FORMS**

Clerk's Office
City of Birmingham, MI

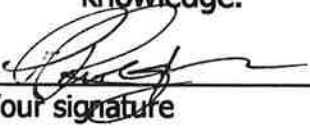
NOV 14 2023

2:30pm
RECEIVED
Kelly Dollard
Clerk's Office

4. Are you aware of any civil, criminal or administrative action pending that involves the same parties as alleged in this complaint which involves substantially the same subject matter? If so identify in detail.

No

5. I declare that the foregoing information is true and accurate to the best of my knowledge.

 _____ 11/14/2023
Your signature Date

Paul Reagan

Your printed name

Address 997 Purdy St., Birmingham MI, 48009

(Number, Street, City, State, Zip)

Daytime Phone (248) 646-7285 Evening Phone (248) 646-7285

Email pmreagan@gmail.com

Please return this completed form to: City of Birmingham
Clerk's Office
151 Martin, P.O. Box 3001
Birmingham, MI 48012

If you have questions about this form, or would like to request the form in an alternate format for the visually impaired, contact the Clerk's Office at 248.530-1880 or write us at the above address. We will take reasonable steps to accommodate your needs.

NOTE: Within seven days of receipt of this form, the Birmingham Ethics Board will set a date for hearing this matter. Any parties involved will be given 28 days notice to appear at the hearing.

Revised 8/16/12

FOR OFFICE USE ONLY

Accepted by _____ Date _____

ETHICS INCIDENT/COMPLAINT FORM

Against Commissioner/Mayor Therese Longe

Explain why you believe that the individual named above may have violated the City of Birmingham's Ethics Ordinance. Be as specific as possible as to dates, times, places, and actions. Attach additional sheets of paper if the space provided below is not sufficient. Also note which specific section in the ordinance was violated.

As stated on the City of Birmingham website, "The mission of the City of Birmingham Board of Ethics is: To foster an environment where city officials, employees, and professional consultants work together with integrity, honesty, and mutual respect, such that decisions are made which honor the public trust and enhance the quality of life in our community."

As a concerned Birmingham resident, I submit to you that disrespectful public conduct by Birmingham City Commissioner Therese Longe, who is also serving as Mayor, is destructive to the environment the Board of Ethics is charged with fostering and is in clear violation of the Code of Ordinances that guides your responsibilities.

On October 27, 2023, this provocative headline appeared on the lead article posted on the website downtownpublications.com: "Improper Host post made again on social media." The primary quoted source for the conjecture and inaccuracy in this derogatory article on Birmingham Commissioner Brad Host was Mayor Longe:

"It is likely for the public to infer from his post that he's urging the public to object to the city and in my opinion, Mr. Host is agreeing that the BZA wrongly ruled against Mr. Colasanti, that the building department was negligent in dealing with him, and he is urging a citizen to take legal action against the city," said Birmingham Mayor Therese Longe."

Mayor Longe's inflammatory conjecture — made in the final weeks of an election — was based on a three-word comment, "Well stated, Frank!" made by Commissioner Host on the social media site Next Door in response to a video posted by Birmingham resident Frank Colasanti, Jr. In his video, Mr. Colasanti, exercising his First-Amendment rights, respectfully shares his disagreement and frustration with city government over his request for a zoning variance. Mr. Colasanti does not suggest in any way that he is contemplating, "legal action against the city."

Revealing an apparent discomfort with respectful public discourse, which is so essential to Democracy and good government, Mayor Longe doubles down on her unfounded conjecture regarding Commissioner Host's three-word response, stating: "It's likely for the public to infer that he's urging the public to object to the city."

Mayor Longe then steps way over the line of civility, blatantly disregarding multiple sections of the Birmingham Code of Ordinances by publicly threatening Commissioner Host, pledging to bring a complaint to the Board of Ethics against Commissioner Host: "There will be no third strike."

Before reviewing the sections of the Code of Ordinances relevant to Mayor Longe's conduct, it is important to fully understand the inappropriateness and potential impact of the forum she chose to advance her conjecture and defamation.

Mayor Longe willingly stepped onto a platform with broad reach and potential impact, well beyond the normal channels of appropriate Commission communication and dialogue. Downtown Newsmagazine describes itself as: "An upscale, full-color, magazine-format publication reaching by direct mail most of the households in Birmingham, Bloomfield Township and Bloomfield Hills . . . The print edition is augmented by a state-of the art website (downtownpublications.com) which is updated at least twice each week and sometimes more often as breaking news dictates."

In the article, Downtown reporter Lisa Brody references an email regarding this matter sent by City Manager Jana Ecker to Commissioner Host "obtained" by the publication. City Manager Ecker refused to comment on the communication or identify the individual who leaked the email to Downtown. The Board should ask Mayor Longe if she is aware of the source and how she was made aware of the correspondence between the City Manager and Commissioner Host.

I have submitted a FOIA request to the city for this email and a response by Commissioner Host referred to in the article regarding Mr. Colasanti. This evidence, which I received from the City on November 10, has been provided to the Board of Ethics for the hearing on this complaint.

Perhaps Lisa Brody and the publishers of Downtown, if released from any promises of confidentiality they may have made to Mayor Longe and/or City Manager Ecker, would testify at the hearing, clearing up any conjecture as to who initiated this malicious attack on Mr. Host in the final weeks of his and Ms. Longe's reelection campaigns.

Specific Code Violations

Mayor Longe's unacceptable behavior violates the following provisions stated in Section 2, "Public Policy," of the Code of Ordinances:

I. Sec. 2-320. (paragraphs 1-2) (the bolding is mine)

Public 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.

The city hereby declares that all 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.

Participating on a public platform with significant public reach to misrepresent the intentions of a fellow Commissioner and issue a threat of Board of Ethics action against that Commissioner through the media — well outside “proper governmental channels” — during an election in which both parties are on the ballot destroys public trust in Birmingham City government in direct violation of the directive to “earn and honor the public trust by integrity and conduct.”

II. Sec. 2-321. - Responsibilities of public office. (paragraph 2)(bolding is mine)

All city officials and employees shall 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.

With her irresponsible comments and public threat against Brad Host, Mayor Longe has been “disrespectful” of a fellow Commissioner, and it is beyond conjecture that her conduct “may tend to undermine respect for city officials and employees and for the city as an institution.”

III. Sec. 2-323. - Intention of code. (paragraph 1) (bolding is mine)

It is the intention of section 2-324 below that city officials and employees avoid any action, whether or not specifically prohibited by section 2-324, which might result in, or create the appearance of:

(5) Affecting adversely the confidence of the public or the integrity of the city government.

It is difficult to see how Mayor Longe’s public display of disrespect for Commissioner Host, her public threat, and willingness to use the media to attack a fellow Commissioner during an election in which she and her target are running for reelection does not erode “the confidence of the public or the integrity of the city government.”

IV. Sec. 2-323. - Intention of code. (paragraph 2) (bolding is mine)

The code of ethics is intended to be preventative and not punitive. It should not be construed to interfere with or abrogate in any way the provisions of any federal or state statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement.

This violation by Mayor Longe should be taken personally by members of the Board of Ethics. Her threat against Commissioner Host reveals an effort to weaponized the Board, using the threat of your intervention — which can be very expensive and disruptive to a targeted individual — to silence and intimidate a fellow Commissioner with whom she rarely sees eye to eye. Her dislike for and political disagreement with Mr. Host should not give her license to settle scores through you. Your findings in this matter can establish much-needed guardrails to limit future misuse of the Board.

V. Sec. 2-324. - Promulgation. (Bolding is mine)

(a) Conflict of interest—General.

2) No official or employee of the city shall represent his or her personal opinion as that of the city.

In the offensive Downtown article, Mayor Longe does not make clear whether her incendiary commentary represents personal thoughts or those of city government. In fact, because the article cites an email by the City Manager, it could be inferred (I guess I'm allowed to use that language as well) that this attack on Commissioner Host is being coordinated.

VI. Sec. 2-325. - Violation, enforcement and advisory opinions.

b) Functions of the board of ethics.

(3)a. The city commission shall be responsible for imposing any sanction for a violation of this Code on one of its members or any person appointed by the commission to any city board.

(3)c. The city manager shall be responsible for imposing any discipline for a violation of this Code on any employee of the city.

Because there is evidence that the Mayor and City Manager may have coordinated this attack on Commissioner Host, I suggest that the Board prohibit Mayor Longe and City Manager Eckert from participating in any discussion or implementation of sanctions that may result from the adjudication of this complaint.

Relevant Prior Board Decisions

I. Birmingham Board of Ethics Advisory Opinion 2023-01

In the Board's Advisory Opinion earlier this year regarding Commissioner Host, it was determined that expressions of bias or closed-mindedness prior to a likely Commission vote constitutes a potential violation of the Code. Because Mayor Longe would be expected to vote on sanctions that could come out of the Board action she threatens against Commissioner Host, I believe this language from your prior opinion is relevant to my complaint:

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.

Mayor Longe's public attack sets up a conflict of interest and clearly interferes with the "proper function of government."

II. Birmingham Board of Ethics Advisory Opinion 2020-01

While there is no justification for Mayor Longe's public behavior and personal attacks, some may not approve of Commissioner Host's three-word response to Mr. Colasanti's video. The Board of Ethics in its 2020-01 decision affirmed the right of public officials to participate in respectful public dialogue and discourse:

[R]espect does not mean that a public official can't disagree with a constituent, even vehemently, or that the public official's opinion can't offend... But the official can disagree and should do so if that is their honest belief. Public officials can't treat citizens as if they don't exist or that their views don't matter.

The Board in its 2023-01 Advisory Opinion added clarity to this finding:

In Advisory Opinion 2020-01, this Board held that social media posts in which a commissioner interacts with constituents, even where the commissioner identifies himself as a member of the Commission, do not violate Section 2-320 of the Code of Ethics because no city guidelines exist with respect to social media. (Advisory Opinion 2020-01 p. 4). Therefore, no standard exists for this Board to apply to assess whether a commissioner's conduct on their social media account conforms to the Code of Ethics.

This recent Board of Ethics guidance makes Mayor Longe's baseless criticism and threats to Commissioner Host even more unconscionable.

By publicly threatening fellow Commissioner Brad Host and participating in, if not not orchestrating a disingenuous public attack on him during the last weeks of an election in which they are both on the ballot, Mayor Longe has undermined the public's trust in Birmingham City Government and materially damaged the environment of respect central to the mission of the Board of Ethics. I look forward to addressing these infractions and their repercussions in more detail and answering any questions you may have at the hearing.

Materials attached:

Text of Downtown article

Colasonti Video https://nextdoor.com/p/jJDqyKWY_KPr?utm_source=share&extras=MTQ0ODU3OTc%3I

Email correspondence between Commissioner Host and City Manager Ecker from FOIA request

Others who may be asked to testify:

- Mayor Therese Longe
- City Manager Jana Ecker
- Brad Host
- Frank Colasonti
- Lisa Brody

Oct 27

Improper Host post made again on social media

By Lisa Brody

Birmingham City Commissioner Brad Host, brought before the city's ethics board in March 2023 by former city manager Tom Markus, who sought an advisory opinion regarding repeated actions Host had taken spreading personal opinions about the city's master plan on social media, flyers, and other means, has once again posted a message on social media which could be inferred to discredit actions by city officials, a violation of the ethics board opinion.

In a video posted on the social media site Next Door, Birmingham resident Frank Colasanti Jr., who lives on Chapin, expressed frustration, concern and anger over a new home being built next door to him, as well as the city's board of zoning appeal's denial of variance requests related to the proposed construction of a new garage on his property and his personal displeasure with the city of Birmingham.

In response to Colasanti Jr.'s video, in which he is threatening litigation against the city, and expressing his unhappiness with the BZA and its rules, Host responded, "Well stated Frank!".

In an email to Host from Birmingham City Manager Jana Ecker, which was obtained by Downtown Newsmagazine, Ecker wrote, "As noted in the Advisory Opinion that was issued by the Board of Ethics on May 15, 2023 regarding a similar comment made by you on social media in relation to the Planning Board, the City's Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. Public officials must avoid conduct that may tend to undermine respect for City officials and employees and for the City as an institution. Further, the Code of Ethics states that City officials must avoid any action which might result in, or create the appearance of adversely affecting the confidence of the public or the integrity of the City government.

"Your most recent statement "Well stated Frank!" regarding a resident's displeasure with the Board of Zoning Appeals and the City is very similar in nature to the comment at issue before the Board of Ethics in May. While you may have been trying to be supportive of a resident, the Board of Ethics has previously held that public officials are obligated to be aware that their words can be misinterpreted or misread."

According to sources, Host responded that he did not believe it was the same kind of situation, and claimed he was only agreeing with a resident. However, city officials have warned and advised all city commissioners, board members and city officials that they can in no way lead a citizen to believe that they are in agreement in any effort that would adversely affect the competency of the public trust in the city and its work.

“It is likely for the public to infer from his post that he's urging the public to object to the city and in my opinion, Mr. Host is agreeing that the BZA wrongly ruled against Mr. Colasanti, that the building department was negligent in dealing with him, and he is urging a citizen to take legal action against the city,” said Birmingham Mayor Therese Longe.

Ecker declined to comment, stating her email reflected her sentiments.

Host said he took his post down, but he did not agree with Ecker, according to Longe.

“It's likely for the public to infer that he's urging the public to object to the city,” Longe stated.

The advisory opinion provided by the ethics board to the administration and commission now provides guidance as to what to do in the future, which as board member John Schrot said, “While not every citizen may have voted for him, he has a fiduciary responsibility to represent every citizen. They want you to come to a meeting with an open mind. Your impartiality – that is what the city manager is trying to point out. It's important you understand the integrity of city government and the public trust... You're a politician. That's your third hat. You're not free to undermine the public trust. You can't say your property will be rezoned, because that may not come to pass.”

In their advisory opinion, the ethics board noted that his position “requires him to avoid conduct, appearance of, affecting adversely the confidence of the public.”

Longe said Host was warned once again, and if he does violate the advisory opinion in any way again, “Yes, it would be taken to the ethics board as a complaint. There will be no third strike.”

Review of Email correspondence

Comments on Next Door

Jana Ecker

to: Brad Host <bhost@bhamgov.org>

1 file

Host Attachment - 10-19-23.pdf

Dear Commissioner Host,

I have had an opportunity to watch a video posted on Next Door by a resident at 1115 Chapin, Frank Colasonti, Jr., regarding his frustration over the new home being constructed on the lot next to his, as well as the BZA's denial of variance requests related to the proposed construction of a new garage on his property and his displeasure with the City. In response to his video, in which he is threatening litigation against the City, and expressing his unhappiness with the BZA and its rules, you responded, "Well stated Frank!".

As noted in the Advisory Opinion that was issued by the Board of Ethics on May 15, 2023 regarding a similar comment made by you on social media in relation to the Planning Board, the City's Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. Public officials must avoid conduct that may tend to undermine respect for City officials and employees and for the City as an institution. Further, the Code of Ethics states that City officials must avoid any action which might result in, or create the appearance of adversely affecting the confidence of the public or the integrity of the City government.

Your most recent statement "Well stated Frank!" regarding a resident's displeasure with the Board of Zoning Appeals and the City is very similar in nature to the comment at issue before the Board of Ethics in May. While you may have been trying to be supportive of a resident, the Board of Ethics has previously held that public officials are obligated to be aware that their words can be misinterpreted or misread. In fact, Section 4 of the Ethics Board Opinion of May 15, 2023 (excerpt attached for reference), found that a similar statement could reasonably be read to cast the Planning Board in disrepute. Your most recent statement with regards to Mr. Colasonti's video

may also be read to cast the Board of Zoning Appeals in disrepute, and could be interpreted as tending to undermine respect for the volunteers on the Board of Zoning Appeals (also City officials) and may result in, or create the appearance of, adversely affecting the confidence of the public and the integrity of the City government that the Code of Ethics requires all City officials to safeguard.

Based on the concerns above, you may wish to consider publicly retracting and/or clarifying your statement on Next Door, and consider an apology to the City officials serving on the Board of Zoning Appeals.

Jana L. Ecker
City Manager
Birmingham, MI
(248) 530-1811

Re: Comments on Next Door

Brad Host

to: Jana Ecker <Jecker@bhamgov.org>

Dear City Manager Ecker,

I write in response to your email yesterday. After careful consideration, I disagree with both

the premise and recommendations. In fact, I am surprised you would find this level of public

discourse objectionable and I question whether you even considered that my comment was

merely an endorsement of the manner of presentation (not the substance). A long-time Birmingham

resident-- whom we both represent-- is exercising his free speech rights, and I am well within

my rights and responsibilities to hear and applaud the measured tone with which he expresses his

views.

My "well stated" remark is very different from the "agree" statement you reference, which was

discussed in front of the Ethics Board earlier this year. The former is an opinion regarding tone and manner, not substance. I make no judgement regarding the strength of Mr. Colasonti's position or the actions to date by the city officials with whom he is dealing. Mr. Colasonti, while clearly frustrated and passionate, does not even come close to stepping over the line of disrespect. For Birmingham's government institutions to function on behalf of the city's citizens, they must be able to hear and respond to public criticism, and Commission members must be free to compliment citizens when they engage in public discourse in measured, respectful ways. It should trouble us all that Mr. Colasonti feels he has "no value." My "well stated" remark requires no clarification online and does not "undermine" respect for any institution, board, or individual. Notwithstanding that reality, in a show of good faith, I have deleted the comment.

I look forward to working with you on behalf of our city's residents. I believe very strongly that public dialogue-- especially when it is this "well stated"-- is at the heart of democracy, free speech, and good government.

I would be pleased to discuss this further with you at your convenience.

Regards,

Brad Host

Birmingham City Commissioner

On Fri, Oct 20, 2023 at 1:46 PM Jana Ecker <Jecker@bhamgov.org> wrote:

Dear Commissioner Host,

I have had an opportunity to watch a video posted on Next Door by a resident at 1115 Chapin, Frank Colasonti, Jr., regarding his frustration over the new home being constructed on the lot next to his, as well as the BZA's denial of variance requests related to the proposed construction of a new garage on his property and his displeasure with the City. In response to his video, in which he is threatening litigation against the City, and expressing his unhappiness with the BZA and its rules, you responded, "Well stated Frank!".

As noted in the Advisory Opinion that was issued by the Board of Ethics on May 15, 2023 regarding a similar comment made by you on social media in relation to the Planning Board, the City's Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. Public officials must avoid conduct that may tend to undermine respect for City officials and employees and for the City as an institution. Further, the Code of Ethics states that City officials must avoid any action which might result in, or create the appearance of adversely affecting the confidence of the public or the integrity of the City government.

Your most recent statement "Well stated Frank!" regarding a resident's displeasure with the Board of Zoning Appeals and the City is very similar in nature to the comment at issue before the Board of Ethics in May. While you may have been trying to be supportive of a resident, the Board of Ethics has previously held that public officials are obligated to be aware that their words can be misinterpreted or misread. In fact, Section 4 of the Ethics Board Opinion of May 15, 2023 (excerpt attached for reference), found that a similar statement could reasonably be read to cast the Planning Board in disrepute. Your most recent statement with regards to Mr. Colasonti's video may also be read to cast the Board of Zoning Appeals in disrepute, and could be interpreted as tending to undermine respect for the volunteers on the Board of Zoning Appeals (also City officials) and may result in, or create the appearance of, adversely affecting the confidence of the public and the integrity of the City government that the Code of Ethics requires all City officials to safeguard.

Based on the concerns above, you may wish to consider publicly retracting and/or clarifying your statement on Next Door, and consider an apology to the City officials serving on the Board of Zoning Appeals.

Jana L. Ecker
City Manager
Birmingham, MI
(248) 530-1811

Re: Comments on Next Door

Jana Ecker

to: Brad Host <bhost@bhamgov.org>

Good afternoon Commissioner Host,

Thank you for your response to my email regarding your comment on Next Door.

Your explanation that your "Well stated Frank!" comment was made to state your opinion regarding Mr. Colasonti's tone and manner only clarified the intention behind your comment. However, it is important to note that as the Ethics Board stated in the May 2023 opinion, your intent is not strictly relevant. The Ethics Ordinance looks to how the public would tend to view your statements, and City officials must 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.*

As Mr. Colasonti was expressing concern about the Board of Zoning Appeals and the actions of the City, and soliciting recommendations for attorneys to potentially sue the City, it is reasonable for the public to interpret what you believed to be a compliment as support for Mr. Colasonti's position that the BZA and/or the City has acted inappropriately.

As a City official, your responsibilities include following the Ethics Ordinance and acting in accordance with the opinions of the Ethics Board. To ensure compliance when you choose to weigh in on similar discussions in the future, a suitable response would be "Frank, I am not endorsing your message, but I appreciate your calmness in sharing your concerns. This is my opinion as a citizen of Birmingham, and I am not speaking as a City Commissioner."

Thank you for deleting your "Well stated Frank!" comment on Next Door. This decision demonstrates compliance with the Ethics Ordinance and the opinions of the Ethics Board.

I too look forward to working with you on behalf of our City's residents, and to continued respectful, open and transparent dialogue on the issues that impact all of us.

Jana L. Ecker
City Manager
Birmingham, MI
(248) 530-1811

On Sat, Oct 21, 2023 at 10:05 AM Brad Host <bhost@bhamgov.org> wrote:

Dear City Manager Ecker,

I write in response to your email yesterday. After careful consideration, I disagree with both the premise and recommendations. In fact, I am surprised you would find this level of public discourse objectionable and I question whether you even considered that my comment was merely an endorsement of the manner of presentation (not the substance). A long-time Birmingham resident-- whom we both represent-- is exercising his free speech rights, and I am well within my rights and responsibilities to hear and applaud the measured tone with which he expresses his views.

My "well stated" remark is very different from the "agree" statement you reference, which was discussed in front of the Ethics Board earlier this year. The former is an opinion regarding tone

and manner, not substance. I make no judgement regarding the strength of Mr. Colasonti's

position or the actions to date by the city officials with whom he is dealing.

Mr. Colasonti, while clearly frustrated and passionate, does not even come close to stepping

over the line of disrespect. For Birmingham's government institutions to function on behalf of the city's

citizens, they must be able to hear and respond to public criticism, and Commission members

must be free to compliment citizens when they engage in public discourse in measured, respectful

ways. It should trouble us all that Mr. Colasonti feels he has "no value."

My "well stated" remark requires no clarification online and does not "undermine" respect for any

institution, board, or individual. Notwithstanding that reality, in a show of good faith, I have deleted

the comment.

I look forward to working with you on behalf of our city's residents. I believe very strongly that public dialogue-- especially when it is this "well stated"-- is at the heart of democracy, free speech, and good government.

I would be pleased to discuss this further with you at your convenience.

Regards,

Brad Host

Birmingham City Commissioner

On Fri, Oct 20, 2023 at 1:46 PM Jana Ecker <Jecker@bhamgov.org> wrote:

Dear Commissioner Host,

I have had an opportunity to watch a video posted on Next Door by a resident at 1115 Chapin, Frank Colasonti, Jr., regarding his frustration over the new home being constructed on the lot next to his, as well as the BZA's denial of variance requests related to the proposed construction of a new garage on his property and his displeasure with the City. In response to his video, in which he is threatening litigation against the City, and expressing his unhappiness with the BZA and its rules, you responded, "Well stated Frank!".

As noted in the Advisory Opinion that was issued by the Board of Ethics on May 15, 2023 regarding a similar comment made by you on social media in relation to the Planning Board, the City's Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. Public officials must avoid conduct that may tend to undermine respect for City officials and employees and for the City as an institution. Further, the Code of Ethics states that City officials must avoid any action which might result in, or create the appearance of adversely affecting the confidence of the public or the integrity of the City government.

Your most recent statement "Well stated Frank!" regarding a resident's displeasure with the Board of Zoning Appeals and the City is very similar in nature to the comment at issue before the Board of Ethics in May. While you may have been trying to be supportive of a resident, the Board of Ethics has previously held that public officials are obligated to be aware that their words can be misinterpreted or misread. In fact, Section 4 of the Ethics Board Opinion of May 15, 2023 (excerpt attached for reference), found that a similar statement could reasonably be read to cast the Planning Board in

disrepute. Your most recent statement with regards to Mr. Colasonti's video may also be read to cast the Board of Zoning Appeals in disrepute, and could be interpreted as tending to undermine respect for the volunteers on the Board of Zoning Appeals (also City officials) and may result in, or create the appearance of, adversely affecting the confidence of the public and the integrity of the City government that the Code of Ethics requires all City officials to safeguard.

Based on the concerns above, you may wish to consider publicly retracting and/or clarifying your statement on Next Door, and consider an apology to the City officials serving on the Board of Zoning Appeals.

Jana L. Ecker
City Manager
Birmingham, MI
(248) 530-1811

From: **Jana Ecker** <Jecker@bhamgov.org>
Date: Mon, Oct 23, 2023 at 1:36 PM
Subject: Re: Comments on Next Door
To: Brad Host <bhost@bhamgov.org>
Cc: City Commission <city-commission@bhamgov.org>

Good afternoon Commissioner Host,

Thank you for your response to my email regarding your comment on Next Door.

Your explanation that your "Well stated Frank!" comment was made to state your opinion regarding Mr. Colasonti's tone and manner only clarified the intention behind your comment. However, it is important to note that as the Ethics Board stated in the May 2023 opinion, your intent is not strictly relevant. The Ethics Ordinance looks to how the public would tend to view your statements, and City officials must 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.*

As Mr. Colasonti was expressing concern about the Board of Zoning Appeals and the actions of the City, and soliciting recommendations for attorneys to potentially sue the City, it is reasonable for the public to interpret what you believed to be a compliment as support for Mr. Colasonti's position that the BZA and/or the City has acted inappropriately.

As a City official, your responsibilities include following the Ethics Ordinance and acting in accordance with the opinions of the Ethics Board. To ensure compliance when you choose to weigh in on similar discussions in the future, a suitable response would be "Frank, I am not endorsing your message, but I appreciate your calmness in sharing your concerns. This is my opinion as a citizen of Birmingham, and I am not speaking as a City Commissioner."

Thank you for deleting your "Well stated Frank!" comment on Next Door. This decision demonstrates compliance with the Ethics Ordinance and the opinions of the Ethics Board.

I too look forward to working with you on behalf of our City's residents, and to continued respectful, open and transparent dialogue on the issues that impact all of us.

Jana L. Ecker
City Manager
Birmingham, MI
(248) 530-1811

On Sat, Oct 21, 2023 at 10:05 AM Brad Host <bhost@bhamgov.org> wrote:

Dear City Manager Ecker,

I write in response to your email yesterday. After careful consideration, I disagree with both

the premise and recommendations. In fact, I am surprised you would find this level of public

discourse objectionable and I question whether you even considered that my comment was

merely an endorsement of the manner of presentation (not the substance). A long-time Birmingham

resident-- whom we both represent-- is exercising his free speech rights, and I am well within

my rights and responsibilities to hear and applaud the measured tone with which he expresses his views.

My "well stated" remark is very different from the "agree" statement you reference, which was

discussed in front of the Ethics Board earlier this year. The former is an opinion regarding tone

and manner, not substance. I make no judgement regarding the strength of Mr. Colasonti's

position or the actions to date by the city officials with whom he is dealing.

Mr. Colasonti, while clearly frustrated and passionate, does not even come close to stepping

over the line of disrespect. For Birmingham's government institutions to function on behalf of the city's

citizens, they must be able to hear and respond to public criticism, and Commission members

must be free to compliment citizens when they engage in public discourse in measured, respectful

ways. It should trouble us all that Mr. Colasonti feels he has "no value."

My "well stated" remark requires no clarification online and does not "undermine" respect for any

institution, board, or individual. Notwithstanding that reality, in a show of good faith, I have deleted

the comment.

I look forward to working with you on behalf of our city's residents. I believe very strongly that public

dialogue-- especially when it is this "well stated"-- is at the heart of democracy, free speech, and

good government.

I would be pleased to discuss this further with you at your convenience.

Regards,

Brad Host

Birmingham City Commissioner

On Fri, Oct 20, 2023 at 1:46 PM Jana Ecker <Jecker@bhamgov.org> wrote:

Dear Commissioner Host,

I have had an opportunity to watch a video posted on Next Door by a resident at 1115 Chapin, Frank Colasonti, Jr., regarding his frustration over the new home being constructed on the lot next to his, as well as the BZA's denial of variance requests related to the proposed construction of a new garage on his

property and his displeasure with the City. In response to his video, in which he is threatening litigation against the City, and expressing his unhappiness with the BZA and its rules, you responded, "Well stated Frank!".

As noted in the Advisory Opinion that was issued by the Board of Ethics on May 15, 2023 regarding a similar comment made by you on social media in relation to the Planning Board, the City's Code of Ethics requires public officials to safeguard public confidence by being honest, fair, and respectful. Public officials must avoid conduct that may tend to undermine respect for City officials and employees and for the City as an institution. Further, the Code of Ethics states that City officials must avoid any action which might result in, or create the appearance of adversely affecting the confidence of the public or the integrity of the City government.

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