

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
JANUARY 19, 2024
MUNICIPAL BUILDING, 151 MARTIN
1:00 PM**

I. CALL TO ORDER

James Robb, Chairperson

II. ROLL CALL

Alexandria Bingham, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of December 19, 2023

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

- A. Review Draft Opinion 2023-04 (Canvasser Opinion Request)
- B. Review Draft Opinion 2023-03 (Reagan Complaint)
- C. February 5, 2024 – City Commission Workshop Planning

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 January 4, 2024.

**City of Birmingham
Board of Ethics Minutes
December 19, 2023
151 Martin, Birmingham**

I. CALL TO ORDER

Chair Robb called the meeting to order at 2:40 p.m.

II. ROLL CALL

Present: Chair James Robb; Board Members Michael Coakley (arrived 2:44 p.m.), John Schrot; Alternate Board Member Judy Doyle (non-voting after 2:44 p.m.)

Absent: None

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

The Board welcomed Ms. Doyle.

III. APPROVAL OF MINUTES

A. Approval of minutes of September 26, 2023

MOTION: Motion by Chair Robb, seconded by Mr. Schrot:
To approve the minutes of September 26, 2023 as amended.

VOICE VOTE: Ayes, Chair Robb
Ms. Doyle
Mr. Schrot

Nays, None

The Chair thanked the Clerk and her Staff.

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

A. Case 2023-04 (Canvasser advisory opinion)

The Chair introduced the case and swore in CM Ecker and Jason Canvasser at 2:46 p.m.

CM Ecker summarized the case. CM Ecker and CA Kucharek answered informational questions from the Board.

Mr. Canvasser then spoke and answered informational questions from the Board.

Board members made the following comments in the course of discussion:

- This case was regarding Mr. Canvasser's status, and not his conduct;
- The questions of the case were whether Mr. Canvasser could be reappointed now, and if not, whether Mr. Canvasser could be reappointed after the litigation resolved;

- Mr. Canvasser has a history in serving on the Board of Zoning Appeals (BZA) and his service benefits the BZA;
- If the initiation of litigation had occurred after Mr. Canvasser's reappointment, Mr. Canvasser likely would have continued serving on the BZA and would have been required to follow the requirements of the Ethics Ordinance (Ordinance). He would have been required to recuse himself from any discussions regarding the subject issue, and would have been required to recuse himself from any vote on the same;
- Regarding whether Mr. Canvasser was a fiduciary for Clark Hill, it was more important what the public would perceive than the legal term that may be most accurate;
- For the purposes of the Ordinance, it would be most appropriate to view Mr. Canvasser as a representative or agent of the 'competing body'. Mr. Canvasser would at least appear to have loyalty to his employer, and would also be expected to have a loyalty to the City in terms of his service on the BZA, the combination of which represents either a conflict-of-interest or the potential impression of one;
- Mr. Canvasser has conducted himself appropriately vis-a-vis this potential conflict-of-interest by recusing himself from both the discussion of, and the voting on, the topic;
- In contrast, in case 2004-02, referenced in the advisory opinion request, it was Mr. Seeger's conduct that caused him to be violative of the Ordinance;
- Section 2.321 would not be relevant in this particular case;
- Section 2.323(5) represented more of a concern. The City had to determine whether it was willing to risk an inadvertent, adverse appearance of a conflict-of-interest;
- There is a balance to be had between the concerns raised by Section 2.323(5) and the value Mr. Canvasser's service on the BZA brings to the City, given Mr. Canvasser's appropriate conduct;
- The City may be willing to assume the risk of an adverse appearance of a conflict-of-interest given the facts of this case, which includes Mr. Canvasser's mitigation of the risk via his appropriate recusals;
- In regards to Section 2.324(a)(6), Mr. Canvasser's testimony is that he would derive no benefit, private or public, with respect to the outcome of the litigation. His recusal on deliberations related to the litigation would amount to a discharging of his official obligations;
- The Ordinance informs an official of their obligations regarding particular matters, and does not address an official's qualification to serve on a Board. The Ordinance references recusals from discussion, deliberation, action, or voting from matters that pose a conflict-of-interest for an official;
- In a somewhat similar past case, it was determined that the firm of a lawyer/City official could continue to represent clients in matters adverse to the City, but the individual lawyer/City official in question could not;
- In both that case and in Mr. Canvasser's testimony, the officials' firms established an ethical wall in order to prevent interaction between the lawyer/City official in question and the cases adverse to the City;
- In that previous case, the ethical wall was found to have cured the conflict-of-interest concern;
- All conflicts require disclosure, and Mr. Canvasser's approach to his disclosure and recusal regarding this matter was to be commended;
- Case 2004-02 was distinct from this case because Mr. Seeger started a group for the sole purpose of fundraising for litigation against the City. In addition, Mr. Seeger was a fiduciary in that matter, for that action that was adverse to the City;

- Mr. Canvasser was likely a fiduciary for his firm, but was not participating in the litigation against the City. Mr. Seeger’s organization existed for the sole purpose of suing the City. In contrast, Mr. Canvasser’s employer exists to serve its clients; and,
- It was appropriate that the City Manager sought the advisory opinion on behalf of the Commission.

It was Board consensus that there was no disqualifying conflict in this case, no prohibition against Mr. Canvasser’s reappointment stemming from the Ordinance, and that the Commission would have the discretion to proceed with the reappointment.

The City Attorney said she had been apprised of third-party concerns, and asked Mr. Canvasser to state affirmatively on the record that he would not harbor resentments against the City, Staff, or BZA members for this case, for the denied variance, and/or if the Circuit Court were to uphold the denied variance.

Mr. Canvasser observed that the questions were inappropriate in the present venue, since this was the Board of Ethics. He stated that he has always carried himself professionally, and that he would continue to do so. He said that if the Commission wanted to address the concerns raised by the City Attorney as a condition of his reappointment, he would be happy to participate.

The City Attorney provided comment on Mr. Canvasser’s reply.

Mr. Schrot indicated that it may be notable to the Commission and the public that Mr. Canvasser was demurring from presently answering the City Attorney’s questions.

Mr. Canvasser reiterated that he would participate in a discussion of those questions with the Commission.

In reply to Mr. Coakley, Mr. Canvasser clarified that he did not hold any animosity towards BZA members who voted adversely to the Clark Hill variance. He also stated that if the decision at the Circuit Court were to go against Clark Hill, he would not bear any animosity towards BZA members who voted adversely to the Clark Hill variance.

The Chair closed the record at 3:27 p.m.

MOTION: Motion by Chair Robb, seconded by Mr. Schrot:
To advise the City Manager and the City Commission that the facts presented to the Board of Ethics did not prohibit Mr. Canvasser’s reappointment to the BZA.

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

Nays, None

The Chair said an opinion should be written. It was determined that Mr. Coakley would write the draft opinion.

The Chair explained the Board’s process to Mr. Canvasser.

The Chair stated that Mr. Canvasser would be eligible for reappointment based on the preceding motion. He explained that the advisory opinion would serve as support for the preceding motion.

Mr. Schrot and the Chair noted that it would be up to the Commission's discretion as to whether it wanted to review the advisory opinion before considering the reappointment.

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.

The Chair provided an overview of the item and explained the Board's process to those present. He greeted Mr. Reagan's attorney, Jordan Bolton, Mr. Reagan, and Commissioner Longe.

The Chair then stated that after reviewing the complaint several times and construing the allegations in the light most favorable to Mr. Reagan, the complaint failed to demonstrate a violation of the code.

MOTION: Motion by Chair Robb, seconded by Mr. Coakley:
To dismiss the complaint by summary decision under Rule 304 because the complaint did not demonstrate a violation of the Code of Ethics on its face, or alternatively dismiss it by summary opinion under Rule 305 because there was no genuine issue as to any material fact.

The Chair explained his lack of concurrence with any of the six posited code violations described within the complaint against Commissioner Longe.

Mr. Schrot explained his agreement with the Chair regarding the lack of basis for the six posited code violations, and said that the dismissal of the complaint would be appropriate pursuant to Rule 304.

Mr. Coakley stated his concurrence with his colleagues, adding that he did not see any genuine dispute about a material fact.

The Chair said he would recommend an order of a decision on the complaint in favor of the respondent.

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

Nays, None

Mr. Bolton asked that a note be added to the record that he was present and prepared to present, that the Board made a decision not to permit him to do so, and not to permit Mr. Reagan to do so.

The Chair said that was fine, and the Chair and Mr. Schrot thanked Mr. Bolton.

The Chair said he would write the opinion for this case.

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

The Chair introduced the item.

Staff summarized the relevant questions or concerns that had been raised by the Commission. Staff also answered informational questions from the Board.

There was a broad discussion of potential topics to address within the workshop.

It was decided that the workshop would be planned during the Board of Ethics' next meeting.

VI. PUBLIC COMMENT

David Bloom made comments about Case 2023-03 and about Commissioner advocacy in light of the Ordinance.

VII. BOARD COMMENT

The next meeting was scheduled for January 10, 2024 at 9 a.m.

The Chair and Mr. Schrot answered an informational question about the Board's process for Ms. Doyle.

VIII. ADJOURN

No further business being evident, the Board adjourned the meeting at 4:58 p.m.

Alexandria Bingham, City Clerk



Laura Eichenhorn, City Transcriptionist

**CITY OF BIRMINGHAM
BOARD OF ETHICS
REQUEST FOR ADVISORY OPINION 2023-04**

ADVISORY OPINION

1. STATEMENT OF FACTS

Jason Canvasser has served honorably as a member of the City of Birmingham Board of Zoning Appeals (“BZA”) since 2016. During his tenure on the BZA, Mr. Canvasser has been and remains today in the active practice of law as an equity principal of the law firm Clark Hill PLC (“Clark Hill”) in its Detroit office. As a Principal of Clark Hill, Mr. Canvasser owes certain fiduciary duties to the firm not relevant to the questions presented in this matter. Mr. Canvasser nonetheless has personal, professional and financial interests in the success of the firm.

Clark Hill has an office located at 220 Park St., Birmingham. On May 11, 2023, Clark Hill applied to the BZA for a dimensional variance for proposed illuminated building signage for its Park St. location. When the Clark Hill variance application came before the BZA at its June 13, 2023 hearing, Mr. Canvasser recused himself and refrained from any discussion, deliberation, action or voting on the matter due to his simultaneous service on the BZA and as a Principal of the applicant, Clark Hill. At the June 13, 2023, meeting the BZA voted 4 to 3 to deny Clark Hill’s application for the dimensional variance.

Clark Hill then filed an action in the Oakland County Circuit Court seeking reversal of the BZA’s decision denying the signage variance. Mr. Canvasser did not participate in the preparation of the action and has not and will not participate in its prosecution.

At the October 2, 2023 City Commission meeting, Mr. Canvasser applied for reappointment to the BZA. He affirmed to the Commission on the record that he would

continue to recuse himself from all decisions regarding Clark Hill. The Commission then determined that before deciding on Mr. Canvasser's application for reappointment to the BZA it would request an advisory opinion from this Board on the appropriateness of his reappointment to and service on the BZA while the Clark Hill action against the City and BZA is pending. The City Manager's Office then filed its Request for Advisory Opinion and Addendum to Request for Advisory Opinion, accepted by the City Clerk's Office by Alexandra Bingham on 11/16/2023.

At a meeting of the Board of Ethics ("BOE") on December 19, 2023, following a presentation by Mr. Canvasser, discussion and questions by the BOE and City Attorney Kucharek, the BOE voted unanimously: "To Advise the City Manager and the City Commission that the facts presented to the Board of Ethics did not prohibit Mr. Canvasser's reappointment to the BZA." (City of Birmingham Board of Ethics Minutes, December 19, 2023, 151 Martin, Birmingham.)

II. DISCUSSION

The City of Birmingham Ethics Ordinance applies to Mr. Canvasser as a City official as defined by §2-322 of the Birmingham City Code. Art. 1X, §§2-320 to 2-326. City officials like Mr. Canvasser are required to disclose all conflicts of interests posed by their service to the City and their duties or obligations to any person or entity holding an interest adverse to the City in connection with their services, duties or obligations owed to the City by virtue of their position as Officials of the City. (Code §2-323.) The Code provides:

- (10) Determination of conflict of interest. A conflict of interest exists if:
 - a. The city or employee has any financial interest, beyond ownership of his or her place of residence in the outcome of a matter currently before that city official or employee, or is associated as owner, member, partner, officer, employee,

broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's or employee's governmental duties, or;

- b. The city official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity, or;
- c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest.

(Code, §2-324(10)).

As a member of Clark Hill, Mr. Canvasser had both a financial and personal interest in the outcome of his firm's application for a signage variance. He thus properly disclosed and recused himself from the matter, and refrained from any discussion, deliberation, action or voting on the matter. Therefore, Mr. Canvasser fulfilled completely his obligations under the Code arising from his conflicting interest in the matter and any City officials faced with similar circumstances who conduct themselves in the same manner as he, would likewise fulfill their obligations under the Code. (§2-324(b).)

In the case where a conflict arises in the course of a City official's exercise of the official's duties as an agent or representative of the City, the Code does not require disqualification of the official from reappointment. (See §2-325(b)). Rather, as stated above, it requires the official to disclose the conflict, recuse him or herself, and refrain from any discussion, deliberations, action or voting on the matter as Mr. Canvasser did here. Also here, as a further safeguard going forward relative to this matter, Clark Hill established an ethical firewall between Mr. Canvasser and the litigation. Therefore, there is no impediment under the Code to Mr. Canvasser's, or a City official acting similarly under similar circumstances, reappointment to his official position with the City.

CONCLUSIONS

1. The appropriate action for a sitting or proposed appointee to a City board or committee ("appointee") who also owes duties to a person or entity that is adverse to the City in pending litigation commenced by the adverse person or entity is to disclose the adverse matter, recuse him or herself from the matter, and refrain from any discussion, deliberation, action or voting on the matter before the appointee's board or committee.

2. In its discretion, the City Commission may appoint or reappoint a person to a board or committee where the person owes duties to a person or entity adverse to the City, board or committee provided the person complies with his or her obligations under the Code.

James D. Robb, Esq. Chairperson

John J. Schrot, Jr., Esq. – Member

Michael P. Coakley, Esq. - Member

BIRMINGHAM BOARD OF ETHICS

COMPLAINT NO. 2023-03

Decision on Complaint

INTRODUCTION

Birmingham resident Paul Reagan filed a complaint against Birmingham City Commissioner Therese Longe alleging that statements she made to the media about the conduct of fellow commissioner Brad Host violated assorted provisions of the Birmingham Code of Ethics. Because the complaint on its face fails to demonstrate that Commissioner Longe violated the code, the Birmingham Board of Ethics issues this summary decision dismissing it.

STANDARD OF DECISION

The Code of Ethics directs the Birmingham Board of Ethics to determine questions or complaints as to the applicability of any provision of the code to a particular situation. Birmingham, Michigan Code of City Ordinances, Part II, Chapter 2, Article IX, § 2-325(b). Questions or complaints submitted to the board are handled according to procedural rules promulgated under the code. *Id.* § 2-325(a)(3)(c). Those rules “are to be construed to achieve the timely, efficient, and cost-effective determination of matters brought before the board.” Board of Ethics Procedural Rules, Rule 102.

Chapter 3 of the board’s procedural rules sets forth the procedure for resolving complaints. The “rules in this chapter apply to the situation where any person has a complaint against a city official or employee, as defined in the Code of Ethics, alleging that the conduct of that official or employee is in breach of the code.” Upon receipt of Mr. Reagan’s complaint, the board’s task is to:

determine whether the respondent’s conduct as alleged in the complaint or demonstrated at the hearing is in breach of the Code of Ethics. The board will make its decision upon a vote of a majority of the board based upon the evidence in the record and controlling law. The board will issue its decision in the form of a written opinion. The opinion, and any dissenting or concurring opinion, will be stated in writing. Once they are issued, the decision and opinions are final.

Id. Rule 319.

The rule governing summary decision provides that, at any time, the board may issue a decision on the complaint for any of the following reasons:

- a. The board lacks jurisdiction over the respondent.
- b. The board lacks jurisdiction over the subject matter.

- c. The complainant lacks the legal capacity to assert the complaint.
- d. The complaint is barred because of release, prior judgment, or other disposition of the complaint before the complaint was filed.
- e. The complaint on its face fails to demonstrate any violation of the code of ethics.

Id. Rule 304. When considering whether to issue a summary decision under Rule 304 (e), the Board of Ethics will assume, solely for purposes of that consideration, that the allegations of the complaint are true.¹

FACTS AS ALLEGED IN THE COMPLAINT

On October 27, 2023, the local news magazine *Downtown Publications* published an article with the headline “Improper Host post made again on social media.” Complaint at 4, 10.² The reference is to Birmingham City Commissioner Brad Host who according to the article was previously brought before the Board of Ethics regarding repeated actions he had taken spreading personal opinions about the city’s master plan on social media, flyers, and other means. *Id.* at 10. The *Downtown Publications* article opined that Commissioner Host “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.” *Id.*

According to the article, Commissioner Host was responding to a video posted on the social media site *Next Door* by Birmingham resident Frank Colasanti, Jr., who “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.” *Id.* at 4, 10.

Downtown Publications characterized Mr. Colasanti’s post as one “in which he is threatening litigation against the city, and expressing his unhappiness with the BZA and its rules.” *Id.* at 10. To Mr. Colasanti’s video, Commissioner Host responded, “Well stated Frank!” *Id.* at 4, 10.

The article reported how a previous Board of Ethics advisory opinion had advised Mr. Host that his prior conduct in making certain public comments about the city’s then-pending master plan did not meet the standards of the Code of Ethics. *Id.* at 11. With respect to the more-recent “Well stated Frank!” comment, the article reported that City Manager Jana Ecker pointed out to Commissioner Host that his comment was similar to one he made and which became a point of contention in his Board of Ethics case and reminded him of his responsibilities under the code. *Id.* at

¹ Rule 305 further allows the Board of Ethics to issue an opinion on a complaint without a hearing if no genuine issue as to any material fact exists. But because the board finds under Rule 304 that Mr. Reagan’s complaint on its face fails to demonstrate any violation of the code, we need not decide this case under Rule 305.

² Mr. Reagan’s 22-page complaint packet, which includes the referenced *Downtown Publications* article and other exhibits, is not numbered sequentially but rather is renumbered within sections. For clarity, the page references in this decision are to the specific pages of Mr. Reagan’s packet, regardless of their internal numbering.

10. The article also recounted that Commissioner Host withdrew the comment but responded to Ms. Ecker that “he did not believe it was the same kind of situation, and claimed he was only agreeing with a resident.” *Id.* The *Downtown Publications* story went on to report that “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.” *Id.*

Downtown Publications then quoted the respondent in this case, Mayor Therese Longe, whose term as mayor has since expired but who remains a city commissioner, as saying:

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. Colasonti, that the building department was negligent in dealing with him, and he is urging a citizen to take legal action against the city.

Id. at 11. The article also reported that Mayor Longe said that Commissioner 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.” *Id.*³

DISCUSSION

Mr. Reagan’s complaint alleges that the statements attributed to Mayor Longe as published by *Downtown Publications* violate six different provisions of the Code of Ethics. The Board of Ethics finds that the allegations on their face fail to demonstrate a violation of the code, and it therefore dismisses the complaint under Rule 304(e).

1. Making Governmental Decisions in Proper Governmental Channels.

The Code of Ethics promotes the City of Birmingham’s declaration that “[p]ublic office and employment are public trusts. For government to operate properly, each city official, employee, or advisor must earn and honor the public trust by integrity and conduct.” Birmingham Code of Ethics § 2-320. Among their responsibilities, public officials and employees must “[m]ake governmental decisions and policy in the proper governmental channels.” *Id.* § 2-320 (2).

Mr. Reagan contends that in making her statement to *Downtown Publications*, Mayor Longe did not honor the public trust by integrity and conduct and specifically

³ A November 16, 2023, update to the *Downtown Publications* article retracted this quote. Instead, *Downtown Publications* reported that, “[i]n response to a question of what could happen if Host violates the ethics board opinion a third time, Longe agreed that the issue could be taken as a formal complaint to the ethics board by any interested party.” For purposes of the instant decision solely, however, the Board of Ethics assumes without deciding that Mayor Longe made the statement as attributed to her in the original *Downtown Publications* article.

that she was making governmental decisions and policy outside proper governmental channels. Complaint at 5-6.

The Board of Ethics finds that the complaint on its face shows that Mayor Longe was not making a governmental decision or policy. Rather, it shows she was commenting to the media on a matter of public import. She was opining, as *Downtown Publications* had done, that Commissioner Host's comments could be interpreted as urging litigation against the very city to which Commissioner Host owes a fiduciary duty. She was pointing out the obvious fact that Commissioner Host could be brought before the Board of Ethics if he violates the code, something that had already occurred earlier in 2023. And the words attributed to Mayor Longe do not even suggest her lack of integrity or her commission of misconduct.

The Board of Ethics thus finds that the allegations on their face fail to demonstrate a violation of this provision of the code.

2. Responsibilities of Public Office.

The Code of Ethics provides that:

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.

Birmingham Code of Ethics § 2-321, ¶ 2.

Mr. Reagan contends that Mayor Longe's comments to *Downtown Publications* were "irresponsible" and "disrespectful" to Commissioner Host and tended "to undermine respect for city officials and employees and for the city as an institution." Complaint at 6.

The Board of Ethics disagrees. Mayor Longe was stating her opinion and giving her interpretation of what Commissioner Host meant by his statement. She was entitled to her opinion and even had a reasonable basis for it, given Commissioner Host's record of stating agreement with a citizen's comment and then disavowing a fair interpretation of his statement, as noted by the Board of Ethics in the prior advisory opinion addressing his conduct. Advisory Opinion No. 2023-01 at 15-16. Nothing in the quoted material is disrespectful to Commissioner Host. Nothing is ad hominem or scandalous. Nothing is below common standards of decency. Nothing is unfair. Nothing undermines respect for city officials and employees or for the city as an institution.

Mr. Reagan correctly acknowledges that some citizens might not approve of Commissioner Host's response in support of Mr. Colasonti's published video. Complaint at 8. Nevertheless, he supports Commissioner Host's right to make that response and quotes from one of our previous advisory opinions: "respect does not

mean that a public official can't disagree with a constituent, even vehemently, or that the public official's opinions can't offend. . . . But the official can disagree and should do so if that is their honest belief." *Id.* at 8 (quoting Decision on Complaint No. 2020-01 at 5). The same tenet applies to Mayor Longe. She had every right to state her opinion.

The Board of Ethics accordingly finds that the allegations on their face fail to demonstrate a violation of this provision of the code.

3. Adversely Affecting the Confidence of the Public or Integrity of the City Government.

Through the Code of Ethics, the city specifically intends that its officials avoid any action which might result in, or create the appearance of, affecting adversely the confidence of the public or the integrity of the city government. Birmingham Code of Ethics § 2-323 (5).

Mr. Reagan contends that Mayor Longe's "public display of disrespect for Commissioner Host," her "public threat," and her "willingness to use the media to attack a fellow Commissioner during an election in which she and her target are running for reelection" tend to adversely affect the confidence of the public or the integrity of the city government." Complaint at 6.

Again, the Board of Ethics disagrees. We have already determined that nothing in the quoted material is disrespectful. And nothing in it adversely affects the confidence of the public or the integrity of the city government. Rather, Mayor Longe's statements were matters of her opinion and interpretation of what Commissioner Host meant by his statement, for which she had a reasonable basis, and were matters of fact about citizens' rights under the Code of Ethics and the Zoning Board of Appeals process. Mayor Longe's statements pertained to a matter of public concern. If anything, her statements tend to promote confidence in government and demonstrate its integrity by suggesting that all citizens have redress through proper governmental channels, including to the Board of Ethics.

Mr. Reagan views Mayor Longe's statements as political campaign statements critical of Commissioner Host's candidacy for election to the city commission. Complaint at 6, 9. This board previously held that campaign statements made by city officials against city commission candidates, even comments that are deemed disrespectful, appalling, or offensive by others, do not violate the code. Decision on Complaint No. 2007-05 at 6-8. Moreover, as we stated in the recent opinion involving Commissioner Host, every city official is entitled to his or her opinion:

The Code is never intended to preclude a city official from expressing his or her opinions on matters that come before his or her respective body. It encourages city officials to act independently. If they cannot express opinions, debate the merits of those opinions, and vote their consciences, the quality of our city's democracy would be significantly impaired.

Advisory Opinion 2023-01 at 14 (citing Advisory Opinion 2022-01, which in turn cites Advisory Opinion 2007-02).

The Board of Ethics thus finds that the allegations on their face fail to demonstrate a violation of this provision of the code.

4. Intention of the Code.

The Code of Ethics “is intended to be preventative and not punitive.” Birmingham Code of Ethics § 2-323, ¶2.

Mr. Reagan contends that Mayor Longe is trying to “weaponize” the Board of Ethics by using the threat of intervention by the board “to silence and intimidate a fellow Commissioner with whom she rarely sees eye to eye.” Complaint at 7.

The Board of Ethics finds Mr. Reagan’s contention unavailing and his citation inapplicable. The provision on which he relies is a rule of guidance and construction for the benefit of the citizens, the city, and the board. Nothing in Mayor Longe’s statement to *Downtown Publications* violates its words or intent. And Mayor Longe had every right to point the out that any citizen can bring to the board a complaint alleging that a city official has failed to abide by the Code of Ethics—precisely as Mr. Reagan has done in this case.

Nor does the Board of Ethics have the jurisdiction or power to “intervene” in anything. The board handles only matters brought to it through the filing of a request for advisory opinion, a complaint, or a referred question of disqualification from a governmental body. After that, its task is to determine the code’s applicability to the particular question or complaint, Code of Ethics § 2-325(b), and, in the instant case, to decide whether the respondent’s conduct is in breach of the code. Board of Ethics Procedural Rules, Rule 319. The board has no enforcement power.

The Board of Ethics finds that the allegations on their face fail to demonstrate a violation of this provision of the code.

5. Opinion of City Officials.

The Code of Ethics provides that “[n]o official or employee of the city shall represent his or her personal opinion as that of the city.” Birmingham Code of Ethics § 2-324 (a)(2).

Mr. Reagan contends that Mayor Longe “does not make clear” whether her comments, which he terms “incendiary,” represent her personal thoughts or those of city government. Complaint at 7. Thus, not only is there no allegation that Mayor Longe was speaking in her personal capacity, the complaint shows that *Downtown Publications* quoted her as the mayor of the city, commenting on a matter of public import, being Commissioner Host’s conduct. Unlike examples of postings from Commissioner Host that were the subject of the advisory opinion pertaining to him, see Advisory Opinion 2023-01, Mayor Longe did not publish the statement on her

own social media or distribute it on a flyer or in a campaign mailing. Rather, Mayor Longe was quoted in the press on a public matter on which she had authority to speak.

Thus, The Board of Ethics finds that the allegations on their face fail to demonstrate a violation of this provision of the code.

6. Enforcement of Violation of Code of Ethics.

The Code of Ethics provides that, after Board of Ethics advisory opinions or hearing findings are published, the Birmingham City Commission is “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.” Birmingham Code of Ethics § 2-325 (b)(3)(a).

Mr. Reagan contends that, because Mayor Longe and Birmingham City Manager Jana Ecker “may have coordinated this attack on Commissioner Host,” they should be prohibited “from participating in any discussion or implementation of sanctions that may result from the adjudication of this complaint.” Complaint, at 7. In support of his contention, Mr. Reagan cites the advisory opinion we decided concerning Commissioner Host. *Id.* at 8 (referring to Advisory Opinion 2023-01). That decision involved false statements Commissioner Host made to improperly influence the work of the city’s planning commission on a matter that would ultimately come to him as a city commissioner for review and approval or rejection.

But nothing related to the instant matter is pending before the Birmingham City Commission for decision. Any contention that Mayor Longe is disqualified from participating in the commission’s consideration of any question that may come before it is premature and unripe for decision by the Board of Ethics. Mr. Reagan’s allegations on their face do not demonstrate a violation of this provision of the code.

CONSTITUTIONAL CONSIDERATIONS

Because the Board of Ethics is dismissing the complaint for failure to demonstrate a violation of the Code of Ethics, we need not reach the obvious constitutional issue surrounding Mayor Longe’s right to make the statements attributed to her. But we offer the following observations.

Fundamentally, Mr. Reagan disagrees with what Mayor Longe is quoted as having said. And he contends that “Mayor Longe willingly stepped onto a platform with broad reach and potential impact, well beyond the normal channels of appropriate Commission communication and dialogue.” Complaint at 5.

We are far from persuaded that comments from the city’s mayor to the local media about a city matter are beyond appropriate channels of communication to the citizenry. And prior Board of Ethics decisions, supported by United States Supreme Court precedent, have held or noted that opinions and truthful statements of city officials can be protected by the First Amendment to the U.S. Constitution.

For instance, we held that a volunteer city advisory board member had the constitutional right to advocate for, and to solicit funds to be expended against the city on behalf of, another volunteer board member who had filed a federal lawsuit against the city for damages, alleging that the city commission illegally removed him from the board. Decision on Complaint No. 2004-02.

And we held that a volunteer city advisory board member could form a political action committee to publish negative advertising exhorting citizens to vote against several candidate for election to the Birmingham City Commission. The advertising said things like, “don’t let those candidates regulate your home,” “their agendas will lead to higher taxes,” “these candidates have personal agendas and resort to divisive tactics.” The record in that case showed that some members of the public thought the advertising to be disrespectful, appalling, or offensive. The Board of Ethics found no violation of the code, including the same provisions on which Mr. Reagan relies here, and further noted that the opinions and statements were protected by the First Amendment to the U.S. Constitution. Decision on Complaint No 2007-05.

Thus, while not deciding the constitutional question because it is not strictly necessary for the determination of this case, we believe it likely that Mayor Longe’s statements are protected by the First Amendment.

CONCLUSION

For the reasons set forth above, the Birmingham Board of Ethics dismisses the complaint.

Michael P. Coakley

James D. Robb, Chairperson

John J. Schrot, Jr.

Dated: