

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
JULY 17, 2017 – 3:00 PM
151 MARTIN, BIRMINGHAM
CONFERENCE ROOM 202**

I. CALL TO ORDER

Appointment of temporary Chairperson

II. ROLL CALL

J. Cherilynn Brown, City Clerk

III. APPROVAL OF MINUTES

A. Approval of minutes of February 6, 2017

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

A. City Commission Referred Advisory Opinion Request 2016-03 dated October 27, 2016

VI. PUBLIC COMMENT

VII. ADJOURN

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](tel:248-530-1880) por lo menos el día antes de la reunión pública. (Title VI of the Civil Rights Act of 1964).

**CITY OF BIRMINGHAM
BOARD OF ETHICS MINUTES
FEBRUARY 6, 2017
151 MARTIN, BIRMINGHAM
CONFERENCE ROOM 203**

I. CALL TO ORDER

MOTION: Motion by Mr. Robb, seconded by Mr. Schrot:
To appoint Mr. Schrot as temporary Chairperson of the meeting.

VOTE: Yeas, 2
 Nays, None
 Absent, 1 (Fierro-Share)

Acting Chairperson Schrot called the meeting to order at 4:00 PM.

II. ROLL CALL

Present: James Robb
 John Schrot, Chairperson

Absent: Sophie Fierro-Share

Administration: City Manager Valentine, City Attorney Currier, Acting Clerk Arft,
 City Commissioner Bordman

Mr. Schrot noted that Ms. Fierro-Share's absence was expected, and that she hopes to be able to attend future meetings soon.

III. APPROVAL OF MINUTES

APPROVAL OF MINUTES OF DECEMBER 16, 2016

MOTION: Motion by Robb, supported by Schrot:
To approve the minutes of December 16, 2016.

VOTE: Yeas, 2
 Nays, None
 Absent, 1 (Fierro-Share)

IV. UNFINISHED BUSINESS

V. NEW BUSINESS

A. CITY COMMISSION ADVISORY OPINION REQUEST DATED OCTOBER 27, 2016

Chairperson Schrot welcomed City Commissioner Bordman to the meeting.

Mr. Schrot discussed the issue of which Board member should write the Advisory Opinion, which questions will be addressed, and whether the Board only address those questions, or should broaden the opinion to address other concerns the Board perceives.

Mr. Robb said he would be happy to write this opinion.

Mr. Schrot remarked that at the last meeting, the Board discussed the practice of the City Commission to appoint a commissioner to a non-profit organization, commented on the merits of that practice, and the distinction between an individual serving on a non-profit board independently vs. sitting on a board as an appointee of the City for a seat that has been designated by that non-profit as a City seat. He suggested that this distinction dramatically changed the landscape to a great extent as the Board members looked at it. From a review of the City Commission minutes, one or more of the commissioners had some concern about the appointment process.

Mr. Robb noted that the Board raised, but did not decide, the question of jurisdiction. Under the Ethics ordinance, the Board of Ethics has jurisdiction to resolve complaints, issue advisory opinions, and to decide conflict in the instance where the Commission, a Board or Committee is considering a matter in which a member of the body has disclosed a potential conflict where the body thinks there is a conflict that is disqualifying. The person who is involved declines to step down, and that question can come to the Board of Ethics immediately and the decision of the Board of Ethics is then binding.

Mr. Robb continued that this is a request for an Advisory Opinion, and the Board reviews those as whether the conduct or the contemplated conduct of a City official meets with the requirements of the ordinance. To some extent that is involved here. The Board has also been asked to discuss whether it is wise for the City Commission to do this. That is a political question. He thinks the Board is not necessarily restricted from offering its opinion on that, and is not sure how much that should bear on the question, because it is really a question for the City Commissioners as the body. However, the Board is charged to be educational as well and that is why we put on the seminars. If the Board decided to frame one of the issues as to whether it is a good practice, it could comment on that. Certainly, the Board needs to address whether it comports with the ordinance, but there is the added question that keeps coming up in its discussions. Maybe the Board does not want to do that, but it probably could, simply as a resource to the Commission.

Mr. Schrot said that much of this comes down to how much risk a Commissioner is willing to take, ethically and politically, by engaging in participation on a non-profit Board. As agents of the City, we are concerned about the certain non-profits effectively identifying a seat on its Board as a City of Birmingham seat. Part of the reason for concern was the public's perception of that and who is principally being benefitted as a result of that. From an ethical standpoint, we focus on public perception even though it may or may not be reality. At the same time, we are saying if the City Commission is going to make it a practice to appoint its commissioners to various Boards, how active do the Commissioners necessarily want to be. How does the City Commission decide which non-profits are going to be allocated a City Commissioner to serve on its Board. If a non-profit comes before the City Commission and asks for a Commissioner to serve, what are the ramifications if that request is refused. The City Commission is going to have to set up some criteria for its selection and appointment to non-profits. Mr. Schrot said it would be beneficial to address that practice, because as part and parcel of all of this, we should point out the risks. He thinks one of the things that will come into play under any circumstance is public perception.

Mr. Robb said we tentatively decided that if the Commission appoints a Commissioner to sit on the seat of a non-profit Board in what is designated the City seat, we determined that does not actually present a conflict under the ordinance because the Commissioner is not in a conflict. The Commission has approved it, and the participation benefits both the non-profit and the City. Where a Commissioner is in the Commissioner's individual capacity on the non-profit Board that has some transactions with the City, there is a real possibility of a conflict of interest within the meaning of the ordinance. He thinks we need to address that too, but that is not really part of the question.

Mr. Schrot asked City Manager Valentine if we are operating under the same set of questions. Mr. Valentine confirmed, and provided the Board members a copy of a communication received from a Commissioner. He added that at the last meeting, there was some discussion by the Board members about doing some additional research on this topic and coming back with that.

Mr. Schrot said his initial research provided an article from the Institute for Local Government entitled, *Commitment to Non-Profit Causes and Public Service: Some Issues to Ponder*. Neither Board member found anything more authoritative to add to the discussion.

Mr. Schrot said from his perspective, many of the concerns referenced in the article are applicable and may be beneficial for the Board to touch upon and at least raise the awareness. He does not think the Board will be able to expressly state absolutes. To some extent, there are certain things that can and perhaps should be said. One of the things the Board agreed upon last time was essentially that a Commissioner cannot shed the City hat when sitting on a non-profit Board. It is especially concerning when sitting on behalf of the City on any Board; it creates additional concerns that may go beyond the ability to say "I'm not going to vote" or "I'm going to recuse myself" should there come an issue before the non-profit Board. Part of the concern is how much political risk a Commissioner wants to take by sitting on a non-profit Board. The public is not going to have the benefit of all the information that the Commissioners and the Board has as far as that person's interaction between the two. So there is going to be public misperception, especially if there are non-profits that come before the City and say that it has funding issues, and asks to have a City Commissioner on its Board. The article discusses some of those concerns. A member of the public and citizen of the City, votes for a Commissioner so that she/he can address issues coming before the City, who then abstains from voting and therefore representing the citizen, because the City appointed the Commissioner to a non-profit Board. Or worse yet, the Commissioner voluntarily elected to participate on the non-profit Board, while a City Commissioner.

Mr. Schrot added that the issue of recusal, which has been discussed by this Board, is another significant political issue. The bottom line for the Board is to advise the City Commissioners that the Commissioners must put the public interest before that of the non-profits. He said the issue of loyalty is important.

Mr. Robb added that part of the recusal discussion last time, is to acknowledge the City Commissioner has a fiduciary duty to the City. By sitting on the non-profit Board in a voting capacity, the Commissioner also has a fiduciary duty to the non-profit Board. Is the fiduciary duty to the City more important as opposed to the duty to the non-profit Board. In a director-based corporation, the fiduciary duty cannot be delegated. The citizens elected the Commissioner to office to bring the Commissioner's background,

knowledge, experience, and judgment to bear on City issues. If a Commissioner finds it necessary to recuse himself/herself, then that deprives the public of the benefit of the Commissioner's experience on that particular question.

MOTION: Motion by Robb, seconded by Schrot:
To receive Commissioner Bordman's email to City Manager Valentine dated February 5, 2017 for the record.

VOTE: Yeas, Robb
 Schrot
 Nays, None
 Absent, 1 (Fierro-Share)

Mr. Robb commented that the first time this was discussed, his concern was what are we supposed to be deciding, because this is a broad topic. He said based upon the discussion last time and his further reading, this can be narrowed down. He explained for Commissioner Bordman the usual process the Board follows:

- Take the testimony/hear the evidence of the "case";
- Close the record;
- Deliberate in public on the record;
- Assign someone to write the opinion, after voting;
- Adopt the opinion at a subsequent meeting.

Mr. Robb proposed that the Board not vote on anything today, but continue to review to refine the thinking. He will draft the opinion, and bring it back at a subsequent meeting for review. Mr. Schrot agreed, and added it is important to be sure that we know that we have addressed what the City Commission and the City Manager need regarding this issue.

As an example, Mr. Schrot feels that the Ethics Board has addressed the first question:

- Does a conflict of interest arise when a City Commissioner is appointed by the Commission to serve as a Board member (voting or non-voting) for community-based organizations? Mr. Schrot said as to that issue, the answer is no. Mr. Robb agreed, and added that it is in effect a waivable conflict, in the sense that it is a known possible conflict, at the City's instigation.

Mr. Schrot added that when the City Commission votes to appoint, it is appointing a City agent to a non-governmental entity, which logically makes little sense. He commented that City Manager Valentine has stated that it appears to be benevolent. However, there is the potential for funding conflicts between the City and the non-governmental entity, so it not as simple as that. He suggested that if the other issues do not address that, the Board would need to elaborate. Otherwise, if one reads the Board's answer to that question, one could say that the Ethics Board thought there was no conflict of interest, when in fact, that may or may not be the issue as to whether or not there is a conflict of interest. Mr. Schrot believes there are pitfalls for a Commissioner even outside the ethics arena, which can then create problems for that Commissioner in the ethics arena.

Mr. Schrot continued with the next questions regarding the type of activities to be engaged in:

- Raising funds and/or soliciting donations on behalf of the organization;

- Voting on matters of funding at both the organizational level and the Commission level;
- Voting on matters of operations and/or activities for the organization that will come to the City for a decision.

As to the question whether a Commissioner should be appointed by the Commission to serve as a Board member (voting or non-voting) for a community-based organization, Mr. Robb suggested framing that as item C., as a liaison, and how it could be different.

Mr. Schrot suggested that when discussing liaisons, what are the criteria for the selection for the entity or entities that the City is going to have liaisons for, and who does that benefit more. Is there a problem that exists that impedes the sharing of information between NEXT and BYA and the City of Birmingham such that a Board member or a liaison must be appointed. He questions whether or not that exists. Those are his concerns, and when we talk about City resources, are Commissioners really doing a service for the citizens by using their time and attention on certain select groups, especially if sitting in a City appointed seat. That would take away from the Commissioners' time and talents on other City business.

City Attorney Currier said there were a number of organizations that came to the City for funding. After an Attorney General's opinion was issued, the cities were no longer permitted to donate money. So a number of organizations lost money from the City. The entities that remained entered into service agreements with the City to provide services to the citizens. Organizations such as NEXT, BYA, Families in Action, etc., enter into a contract to provide those citizens with services, and they have to report on the services they provide. He suggested that might have some bearing on the discussion and how it is framed.

Mr. Currier added that the organization must provide some service to City residents. Mr. Valentine added that historically the organizations we have agreements with are the organizations we have provided funding to in the past. No new requests have come in. Once the requirement for justification to the City for an organization's service was in place, the donation requests ended. Mr. Valentine said there are about seven organizations currently that receive funding from the City. Mr. Robb asked if the Board could be provided a list of the organizations. Mr. Currier added that there are two organizations that have Board members. Mr. Robb clarified that the other organizations qualify for the agreements.

Mr. Robb asked Mr. Schrot for his thoughts as to whether this is a conflict under the ordinance or a political question. Mr. Schrot said he believes it is a political question, and if the City appoints a liaison, or agent, he does not believe in and of itself, it is a conflict of interest. So appointing a non-participatory liaison does not avoid a conflict of interest. But it does not eliminate the potential ethical problems that a Commissioner might have because they are called a liaison vs. a Board member. When a Commissioner participates on a non-profit Board, the Commissioner is not really functioning, and the organization is told that the Commissioner is not going to vote if the organization comes before the Commission. The point is, is the Commissioner anything more than a liaison.

Commissioner Bordman commented that her appointment by the Commission to the NEXT Board is not a conflict. The potential conflict arises whether sitting at a Board and

having the non-profit come before the Commission for funding, if there is a conflict in her voting at the Commission level, or if she has not voted or participated in decision-making in the non-profit level. Historically, past Commissioners who have been appointed have voted at the non-profit and recused themselves at the Commission level. The Board could decide that there is no conflict in the appointment, but the Commissioner is prohibited from participating in either place or one place or the other.

Mr. Schrot agreed with her comments, said irrespective of whether or not a Commissioner voted at the non-profit, then the Commissioner would recuse herself/himself at the Commission vote. Commissioner Bordman asked should the Commissioners decide whether it is a conflict as they do in other situations. Mr. Schrot agreed. She asked if just by virtue of being in a non-profit Board meeting, a Commissioner should not be voting at the Commission level. Mr. Schrot said he would not go that far, and it depends what the vote is at the non-profit. Mr. Robb said the Commission appointed the Commissioner to the Board knowing the Commissioner is on the non-profit Board.

Commissioner Bordman said that right now, she is a Board member and not a liaison. Mr. Robb said a Board member is different from a liaison. Mr. Schrot agreed, and said with a Board member, there is an expectation that the Commissioner will be voting. Commissioner Bordman asked if there is a difference between a non-voting Board member and a liaison. Mr. Schrot thinks so, because the Commissioner is still wearing the hat of a Board member of a non-profit. As a liaison, you are just wearing the City hat. Mr. Robb asked if Commissioner Bordman voted at all. She responded that she votes on nothing, and advised the NEXT Board of her concern about sitting as a Commissioner and participating as a voting member of the NEXT Board. That was acceptable to NEXT. She feels that they consider her a full-fledged Board member who does not vote, because she has had no clarity on this issue. She feels that her first responsibility is to the people she represents as an elected official. So she took herself out of decision-making at the NEXT Board. Mr. Schrot responded that is wise, but the problem is that the Commissioner is publicized as a NEXT Board member. Commissioner Bordman said she is unclear why the City Commission ever talked about the reasons for the appointment. At the time she took the seat, she did not think much about it, but felt this needed to be clarified. Mr. Schrot asked if she felt at risk if the NEXT Board came before the Commission for funding. She responded that so far, it has not come up, but she said she would disclose that she had not been a part of any decision making or voted, and consequently does not feel there is a conflict. She said that is why we need an advisory opinion. Mr. Schrot agreed and said the public would ask why would she put herself in that position when she knew that any issue involving NEXT would require her to she recuse herself. Mr. Schrot added the Commissioner may find that he or she does not want to be put into a position by the Commission making the appointment that might have an adverse effect on the Commissioner.

Ms. Bordman said that it is a position of some standing to be part of BYA or NEXT. She does not believe that we have heard from a member of the public that they are unhappy about having a Commissioner in that role.

Mr. Schrot said BYA stated in their letter that it wants the Commissioner to be involved in part for funding purposes, and asked how is the public going to perceive that. Is the loyalty to the City or to the non-profit Board. Commissioner Bordman agreed, and said that exacerbated the need to have an Ethics Board say that certain things are not

permitted, because of the danger of soliciting funds. She feels that if the Commissioner is appointed by the City to a non-profit, and that non-profit requires the Commissioner to solicit funds from the public even though it is for the good of the organization, the risk is that the person solicited will consider that donation to give them an advantage at the Commission level, especially someone who does business with the City.

Mr. Valentine said it is important to clarify that the relationship with NEXT is not the same as the relationship with BYA. BYA has the expectation of fundraising and other involvement that NEXT does not.

Commissioner Bordman said any fundraising requirement presents a possible quid pro quo scenario. It may give a wrong impression when the donor comes before the Commission. Mr. Robb said the problem is that the Commission has said the Commissioner can participate in fundraising since it has been spelled out in the BYA communication. Commissioner Bordman finds that particular arrangement inappropriate.

Mr. Schrot asked does the City have any liaisons with any groups. Mr. Valentine responded that none have been formally appointed. Mr. Schrot asked what would be the need for a Commissioner as a liaison with a non-governmental entity. Mr. Valentine said the sharing of the information between the City and organization. Mr. Schrot asked if the City is not doing enough communication with its citizens and its groups. Mr. Valentine said based on the lack of those types of requests for a liaison to be appointed, that is not the case.

Commissioner Bordman knows that there is a state law regarding the City's obligation to provide services for the elderly. She also knows that there is a close relationship in particular with NEXT, and maybe BYA as well through the PD. The funding to NEXT is substantially more than to BYA. She sees an advantage in the City having a person there to watch to be sure that the mission is being carried out. Mr. Valentine said it is a comfort level. Commissioner Bordman said part of the reason the City funds NEXT is to provide the senior services that the City does not, so NEXT provides the services for the City.

Mr. Schrot asked would the Chamber of Commerce be in a similar situation. Commissioner Bordman said we do not fund it, because the Chamber does not provide a service that the City is required to provide. She is not sure if there are any similar requirements to fund BYA because of the services they provide. Mr. Valentine said there is certain funding (CDBG) that we receive through the county from the state to provide these services. That is not a large amount. The amount provided from the general fund is in excess of \$100,000 to NEXT. There are a number of communities that provide funding to NEXT.

Mr. Schrot confirmed that NEXT has a financial reporting requirement to the City. He asked what a liaison would report that would not be provided via the reporting requirement from NEXT. Mr. Valentine suggested it might be more operational. He confirmed that they are required to report once a year to the Commission about the services provided and to justify its needs.

In response to Mr. Robb, Mr. Currier said the City stopped contributing to all the various requestors about 10-12 years ago. Mr. Valentine added that it immediately converted over to the service agreements at the same time.

Mr. Robb asked how long the City has had the practice of appointing Commissioners to the Boards. Mr. Currier said that was in place before he and Mr. Valentine were employed by the City, and pre-dates the Ethics ordinance. Mr. Currier said from time to time there have been concerns raised about the practice of appointment and potential liability.

Mr. Robb said one of the provisions in the code, Section 2-324 (a)(4) says "no official or employee of the City shall directly or indirectly, solicit or accept any gift or loan of money, goods, services or other thing of value for the benefit of any person or organization, other than the City, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties." For example the BYA Board is raising money for its programs, and a monetary gift is solicited from someone about to have a bistro license. The Commissioner has solicited a gift for the benefit of BYA, and it could tend to influence the Commissioner's vote. Mr. Schrot added that later on, if questions are asked about prior involvement with that donor/applicant, it could become a legal question.

Mr. Robb said the City Commission cannot authorize the Commissioner to violate the ordinance. That conflict is not cured by the appointment. Appointments are made by resolution, and resolutions do not trump the ordinance. Mr. Robb said it is easy in his mind, that a Commissioner cannot raise money.

Mr. Schrot noted that the ethics article raises fundraising concerns. He said under certain ordinances, using one's official position to, in essence force donations, to non-profits violates state and federal laws that prohibit extortion and protect the public's right to officials' honest services. In the scenario Mr. Robb described, the Commissioner has to be aware of being in that position because it is quicksand.

Mr. Schrot asked by benefitting the Board, does that benefit the City by way of potentially not having to contribute as much itself, if it can elicit donations from third parties. Mr. Robb agreed it could benefit the City and has the appearance then of quid pro quo.

Mr. Schrot asked if our ordinance has a disclosure requirement in the event a public official is the one who suggests that a donor make a donation. Mr. Robb said Section 2-324(b)(1) requires full disclosure by the official. Mr. Schrot said the ethics article raises the point that financial disclosure applies if the public official is the one who requests or suggests the donor make the donation. Mr. Schrot said the goal is to avoid the perception or reality that someone received special treatment by virtue of having donated to a public official's favorite causes.

Commissioner Bordman noted that while NEXT has held some fundraising events, she has not been asked to approach anyone by the Board to donate. She said it would be helpful to have clarity in the opinion so that the Commissioner has something to point to if such a request is ever made, assuming the Board concludes that Commissioners may serve on these Boards as a liaison to the Board.

Mr. Schrot referred to the ethics article that brings up the fact if the public official's name appears on the solicitation as part of the letterhead, there may be a disclosure requirement associated with that. If a Commissioner is going to accept an appointment, the Commissioner is essentially lending his/her name, and that has to be considered in the context of being a public official. It creates pitfalls for a City Commissioner and to a certain extent emasculates that Commissioner's ability to function on various City business. That is part of the concern the Board has. He is not saying that there is an absolute prohibition on serving as a Commissioner on a non-profit Board. He thinks it can be done effectively if one is willing to take on the risks and responsibilities. It is those risks and responsibilities that the Board can in part delineate, and he thinks in light of the fact that the Commissioners are bound by the City's Ethics ordinance, which has a lot of gray in it, in part because it prohibits certain actions due to the public's perception. It can be analogized to judicial disqualification. It used to be that actual bias of a judge had to be shown. Now, it is the appearance of impropriety to the reasonable man. It is difficult to define and call these things except on a case by case basis. If a Commissioner intends to be vigilant, fully educate herself/himself on the Ethics ordinance and state and federal laws that relate to fundraising, how the Commissioner's name is going to be used, and the restrictions the organization has, it would be more comfortable.

Commissioner Bordman has assumed she had nothing to do with fundraising at NEXT, but it puts out a monthly newsletter that lists the Board members. An annual fundraising effort is included in the newsletter. She asked if that is a problem. She added that when she is there, she is there as a City Commissioner. Mr. Robb did not think it was a problem, because she is not making the solicitation.

Mr. Schrot suggested it may heighten her disclosure requirement if her name is being used in certain context. Commissioner Bordman confirmed that a Commissioner could prevent that by telling the organization to not include her name in a fundraising effort. Mr. Schrot agreed, and said that is where vigilance comes in, in identification of potential problems, and sensitivity to disclosure in these situations. He added he is not familiar with state and federal laws in that regard.

Mr. Valentine said it would be helpful to the Commission to answer the fundamental question and provide a best practice type approach to handle these issues which becomes a guide the Commission can use as a resource. He agreed that every situation is difficult to identify how to comply with the Ethics ordinance. It may be helpful to set forth some basic parameters to consider in order to avoid finding oneself on the wrong side of a situation.

Mr. Robb explained his upcoming schedule as it relates to the drafting of the opinion. Mr. Schrot asked if we should impose a non-profit ban in the meantime. Mr. Valentine noted that we have not heard back from BYA, so there is no sense of urgency. The Commission would like to see this resolved to the point where they are comfortable.

Mr. Schrot asked that the Clerk's Office provide Commissioner Bordman with a copy of the ethics article that has been referenced. He complimented Commissioner Bordman on her efforts to get clarity and guidance on this issue.

Commissioner Bordman said she values the City's relationships with non-profit organizations and would hate to lose those.

Mr. Schrot thinks the opinion should include both the City-appointed scenario and participation on a Board individually by a Commissioner because it is a different analysis for each. Part of the message is that irrespective of whether the City appoints, if a Commissioner sits on a non-profit Board, the Commissioner has to be aware of what the ordinance requires in the way of speaking on behalf of the City, public perceptions, and the disclosure requirements. He thinks a Commissioner is insulated somewhat by being appointed.

The Board members asked that the opinion be distributed prior to the next Board meeting and comments and/or revisions will be discussed at the next Board meeting.

VI. PUBLIC COMMENT

VII. ADJOURN

The meeting was adjourned at 6:02 PM.

ca

[DRAFT OPINION]

CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2016-03

DECISION

On October 27, 2016, the Birmingham City Commission adopted a resolution requesting the Birmingham Board of Ethics to issue an advisory opinion on the following question:

Is there a conflict of interest with City Commissioners serving as board members for community-based organizations that rely on the City for funding, and what actions should be followed if they wish to serve on boards that make requests to the City Commission?

QUESTION PRESENTED

The question presented seems simple, but the answer is not. Following two hearings to obtain and review relevant information, the Board of Ethics restates the question this way:

Is it a violation of the City of Birmingham's code of ethics for a member of the Birmingham City Commission to serve as a member of a board of directors of, or an advisory committee to, a community-based organization that solicits or receives funding from the city when the particular seat on that board or committee is reserved for a city commissioner and the City Commission by resolution appoints a particular commissioner to that seat?

SUMMARY OF ANSWER

The Board of Ethics answers the question in three parts.

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

- the commissioner is barred by the code of ethics from participating in that organization's consideration of a request to the city for funding, license, or other substantial support from the city,

- the commissioner is disqualified from participating in the city’s consideration of any such request from that organization, and
- the commissioner’s participation in fund-raising activity for the organization could result in a conflict of interest if the party from whom the gift is sought has business before the city.

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

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

STATEMENT OF FACTS

The Board convened two public hearings on this matter to gather and discuss the facts. On December 16, 2016, City Manager Joseph Valentine and City Attorney Timothy Currier appeared and presented information to the Board. On February 6, 2017, City Commissioner Patty Bordman joined Messrs. Valentine and Currier to present additional information. The Board thanks Ms. Bordman, Mr. Valentine, and Mr. Currier for their efforts.

The organization known as NEXT-Your Place to Stay Active & Connected (“NEXT”) is a registered assumed trade name for the Birmingham Area Seniors Coordinating Council (“BASCC”), a community-based organization founded decades ago to promote the welfare of senior citizens in our community. NEXT has traditionally reserved one or more seats on its board of directors for municipal representatives, in this case a Birmingham city commissioner. The custom is that NEXT asks the Birmingham City Commission to appoint a commissioner to that board seat. At the present time, Commissioner Patty Bordman is the city’s municipal representative. She serves as a voting member of the NEXT board of directors. The Board of Ethics takes administrative notice that BASCC is a Michigan non-profit, directorship-based corporation, organized on a non-stock basis. (BASCC Articles of Incorporation (July 1, 1981)).

Similarly, Birmingham Youth Assistance (“BYA”) is a long-standing community organization dedicated to promoting youth and reducing delinquency in the Birmingham community. As with NEXT, it is BYA’s custom to request the City Commission to

appoint a commissioner to serve on its General Citizens Committee (“GCC”). That committee meets up to nine times a year. The city commissioner is expected to attend as many GCC meetings as possible, volunteer to participate in one or more BYA community outreach activities, and “support” BYA fund-raising activities. The BYA understands that the city commissioner might be faced with a conflict of interest and has stated that fund raising is an “optional” activity for a GCC member, yet it stresses how important fund raising is to the success of its mission. (BYA letter to Joe Valentine (October 3, 2016)). The Board of Ethics takes administrative notice that BYA is a Michigan non-profit, directorship-based corporation, organized on a non-stock basis. (BYA Articles of Incorporation (June 14, 1967)). As such, the GCC appears not to be the BYA’s governing board. The BYA has asked that the city appoint Commissioner Andrew Harris to its GCC.

City commissioner participation with NEXT and BYA is a long-standing city practice, viewed as beneficial both to the community organizations and the city. Among other benefits, the organizations receive input through official city channels on important matters and presumably derive prestige and connections from city commissioner participation in their activities. In turn, the city, which provides grant funding to NEXT and BYA, can be directly informed about their activities and needs and can monitor how the city’s appropriated funds are used. Former Commissioner Scott Moore served on the NEXT board for a decade or longer. Former Commissioner Tom McDaniel was the City Commission’s representative to BYA for many years until his term as commissioner ended in November 2015.

More recently, various city commissioners have properly expressed concern that participation with NEXT and BYA potentially presents a conflict of interest. At the outset, the Board of Ethics notes that NEXT and BYA, and not a particular commissioner, seek city commissioner participation on their boards. Requests from NEXT and BYA typically come directly to the city. Information provided at the hearings indicates that both organizations view these seats as a “city” seat. Mr. Valentine said that in these cases, the commissioners, through their public roles, are asked to serve with NEXT and BYA. Mr. Currier confirmed that the commissioners are appointed to a “city seat” on the respective boards, and the appointment is made by the city, not by the organizations. Thus, procedurally, the City Commission votes on a resolution determining which commissioner takes the NEXT or BYA seat, thereby authorizing that commissioner to participate in their respective activities.

Due to their concerns about a potential conflict of interest, city commissioners have discussed the role a commissioner might play on the NEXT board of directors or the BYA committee. Those discussions have included whether the commissioner should be a voting member, a non-voting member, or merely a liaison, and whether or to what extent a commissioner could raise funds or do other things to support either organization. During the Board hearing, both Mr. Valentine and Mr. Currier pointed out that, traditionally, the commissioner sitting on the NEXT board or BYA committee would

neither participate in discussing requests for city funding at the organization level nor vote on such requests at the City Commission level. The Board received information, however, that in the past a city commissioner might occasionally have voted in a NEXT meeting about a funding request to the city but then did not participate in the City Commission's consideration of that request.

JURISDICTION

Several factors make this case complicated. A commissioner's role with these community organizations is potentially very broad. But that role is expressly authorized by the City Commission. And the case involves not just compliance with the code of ethics, which is within the jurisdiction of the Board, but also questions of political conduct which are not within our jurisdiction. Thus, while the Board of Ethics endeavors to help the City Commission and all city officials and employees meet the requirements of the code of ethics, the Board must remain mindful of its jurisdiction. The code provides:

When there is a question or a complaint as to the **applicability of any provision of this code to a particular situation**, that question or complaint shall be directed to the board of ethics. It shall then be the function of the board of ethics to conduct hearings and/or issue an advisory opinion, as applicable.

Birmingham City Code § 2-325(b) (emphasis added).

Chapter 2 of the applicable procedural rules gives added jurisdictional guidance:

The rules of this chapter apply to the situation where 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"), **requests 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."

Board of Ethics Procedural Rules, Chapter 2, Preamble (emphasis added). After the requesting party initiates the request for the advisory opinion, the duty of the Board of Ethics is defined but limited:

The board **will determine whether the conduct or anticipated conduct of the requesting party or the subject party, as the case may be, conforms to 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 advisory opinion. The advisory opinion, and any dissenting or concurring opinion, will be stated in writing. Once they are issued, the opinions are final.

Id. Rule 215 (emphasis added).

In this instance, the City Commission has requested guidance on whether it is in a conflict of interest, or is placing its commissioners in a conflict of interest, by authorizing commissioners to sit on the NEXT board or the BYA committee. Based on the language of the code of ethics and the procedural rules, the Board of Ethics finds that it has jurisdiction to determine whether commissioner participation on the board or a committee of a community-based organization as set forth in the question presented violates the code.

The Board of Ethics also notes, however, that it lacks jurisdiction to offer a binding opinion on the propriety or wisdom of that participation. The code of ethics and Board precedent establish that the Board deals in cases, not abstract propositions. Nevertheless, the Board serves as an educational resource for the city and thus offers observations it hopes will guide the City Commission and individual commissioners.

APPLICATION OF THE CODE OF ETHICS

At its core, the city's code of ethics is a conflict of interest ordinance. Its foundational premise is that "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." Birmingham Code of Ethics § 2-230. Thus, all city officials and employees must avoid conflicts between their private interests and the public interest. *Id.* They must be independent, impartial, and responsible to the people. *Id.* They must make governmental decisions and policy in proper channel governmental channels, and they may not use public office for personal gain. *Id.*

Through the code, the city intends that "city officials and employees avoid any action . . . which might result in or create the appearance of:

- (1) Using public employment or office for private gain;
- (2) Giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person;
- (3) Losing complete independence or impartiality of action;
- (4) Making a city decision outside official channels; or
- (5) Affecting adversely the confidence of the public or the integrity of the city government.

Id. § 2-323.

A key question relevant to this opinion was raised several times in the Board’s hearing: if there is a conflict of interest, whose conflict is it? Notably, the code’s conflict of interest provisions pertain to the conduct of city officials and employees, not to the city as a governmental entity. A “city official” or “employee” is defined to include:

a person elected, appointed or otherwise serving in any capacity with the city in any position established by the City Charter or by city ordinance which involves the exercise of a public power, trust or duty. The term includes all officials and employees of the city, whether or not they receive compensation, including consultants and persons who serve on advisory boards and commissions.

Id. § 2-322 (emphasis added). The City Commission, being a governmental body, is not “a person” within the meaning of the code of ethics. Thus, its conduct as a body is not regulated by the code.

The code of ethics has specific conflict of interest provisions, of which an important one is that “no official or employee of the city shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties.” *Id.* § 2-324(a)(6).

Specifically, a conflict of interest exists if:

- a. The city official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of a matter currently before that city official or employee, or is associated as owner, member, partner, officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's or employee's governmental duties, or;
- b. The city official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity, or;
- c. The public official has any other prohibited interest as defined by state statutes relating to conflicts of interest.

Id. § 2-324(a)(10).

DISCUSSION OF POTENTIAL CONFLICTS OF INTEREST

There is No Per Se Conflict of Interest

Under the code of ethics, the City Commission's appointment of a city commissioner to the NEXT board of directors or the BYA committee does not in and of itself result in a conflict of interest.

The Board of Ethics notes first that the City Commission itself makes the appointments through governmental action that assigns to the commissioner a governmental duty. It does not necessarily result in a conflict of interest because, by definition, it is not "adverse to the public interest in the proper performance of said official's or employee's governmental duties." *Id.* § 2-324(a)(10)(a). Likewise, the appointment does not necessarily result in "service [that] is incompatible or in conflict with the discharge of [a commissioner's] official duties" or in "employment [that] may tend to impair his or her independence of judgment or action in the performance of his or her official duties." *Id.* § 2-324(a)(6). It hardly need be questioned that the City Commission has the authority to prescribe certain duties of its members, although as will be seen below that authority is not unlimited.

Moreover, there is no showing on this record that the commissioner has reason to believe that he or she will derive a monetary gain or suffer a monetary loss by reason of his or her official activity. *Id.* § 2-324(a)(10)(b). And the Board of Ethics is aware of no other legal prohibition on this appointment. *Id.* § 2-324(10)(c).

Accordingly, under these facts, a commissioner serving in the role of a NEXT board or BYA committee member is not, solely by virtue of that appointment, in a conflict of interest situation within the meaning of the code of ethics. What matters is what the commissioner does in that role.

But a Potential Conflict of Interest Exists

That said, the Board of Ethics finds that such an appointment could result in incompatible service resulting in a prohibited conflict of interest, especially if the appointment is to an organization's board of directors. In fact, the Board notes an important legal distinction between a city commissioner's service as a member of the NEXT board and a member of the BYA committee.

The BYA GCC is merely an advisory committee whose members owe to BYA whatever duty it establishes. A city commissioner's appointment by the City Commission to the BYA committee is not "incompatible or in conflict with the discharge of his or her official duties," because the City Commission's authorizing resolution determines the appointment to be compatible. While the independence of judgment of a commissioner who joined a volunteer advisory board on his or her own

volition could be called into question, under the present facts the City Commission is fully informed of the relationship between the commissioner and the BYA and its potential effect on the commissioner's city duties, one of which is defined by City Commission resolution to be membership on the BYA committee. As merely an advisory committee, the GCC does not control the BYA or set its policy.

By contrast, a city commissioner's service on the NEXT board of directors creates a substantial potential for a conflict of interest because the board of directors is NEXT's corporate governing body. Under Michigan law, directors of a corporation owe the corporation a fiduciary duty. *Wagner Electric Corp. v. Hydraulic Brake Co.*, 269 Mich. 560, 564; 257 N.W. 884 (1934). Directors must act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the corporation. MCL § 450.2541.

Because of that fiduciary duty, a city commissioner who participated in the corporation's consideration of a request for funding, license, or other special benefit from the city would be in a conflict between his or her "private interests and the public interest," Birmingham Code of Ethics § 2-230, and for being "associated as owner, member, partner, officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter." *Id.* § 2-324(a)(10)(a). Clearly, a commissioner's independence of judgment or action in the performance of his or her official duties could be impaired or called into question by participating as a fiduciary in matters before the corporation's board.

The code of ethics also provides that "[n]o official or employee of the city shall participate, as an agent or representative of the city, in the negotiation or execution of contracts, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision, relating to any business entity in which he or she has, directly or indirectly, a financial or personal interest." *Id.* § 2-324(a)(7). Under this provision, a commissioner serving on the NEXT board of directors would be disqualified from voting on a City Commission resolution to appropriate funds, grant a license, or provide special services or consideration to NEXT.

The fact that the City Commission appoints its commissioner to the NEXT board does not cure the conflict. Although the appointment certainly constitutes city business and becomes one of the appointed commissioner's official duties, the appointment imposes upon the commissioner competing, irreconcilable fiduciary duties on matters that involve both NEXT and the city. The code of ethics is an ordinance that takes precedence over City Commission resolutions. Absent an amendment to the code, the City Commission cannot by resolution authorize a commissioner or anyone else to conduct city business in a way that violates the code's conflict of interest prohibitions. To do so would "be adverse to the public interest in the proper performance of said official's or employee's governmental duties."

Of course, a city commissioner's service as a member of the NEXT board of directors or the BYA committee would include tasks and duties unrelated to business with the city, which thus would not necessarily result in a conflict of interest. Accordingly, membership on that board or committee is not a conflict of interest per se, and our holding is distinguishable from our earlier decision involving Ralph L. Seger, Complaint No. 2004-02 (June 8, 2004). In the *Seger* case, the respondent, then a member of the city's general investment committee and Barnum steering committee, was also a fiduciary in an organization—a fund to prosecute litigation against the city—whose sole purpose was adverse to the city. The Board held that the respondent could serve in one capacity or the other but not both. The code of ethics does not require city commissioners serving on the NEXT board or BYA committee to make that election.

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

As noted above, the code of ethics does not prohibit a city commissioner from serving as a member of a community organization's advisory committee such as the BYA GCC. But a commissioner serving in that role must remain mindful of the potential for a conflict. He or she must be vigilant if any of the organization's business comes before the city and must make the judgment as to whether to disclose or recuse himself or herself in the matter before the city. Even if the risk of that conflict is less than the one facing a member of the NEXT board, that risk is real and depends on a variety of circumstances. An important one concerns fund raising.

Special Consideration of Fund-raising and Outreach Activity

A substantial potential conflict raised at the hearings on this case involves fund-raising and outreach activity by the commissioner on behalf of the community organization. Two provisions of the Code bear on this question.

First, “[n]o official or employee of the city shall directly or indirectly, solicit or accept **any gift** or loan of money, goods, services or other thing of value **for the benefit of any person or organization, other than the city, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties.**” *Id.* § 2-324(a)(4) (emphasis added). In this case, the commissioner is assigned to the organization as part of his or her city duties. Thus

any perceived attempt to secure advantages for NEXT or BYA by seeking funds from other sources is not unreasonable; rather, it is authorized by the City Commission. So long as the City Commission knows that fund raising or outreach could be a part of those duties, those activities are not a per se violation of the code of ethics.

Given the holdings above, a city commissioner who solicited gifts for NEXT would be disqualified from participating in City Commission consideration of any matter that involves NEXT; thus, participation on the NEXT board would not tend to influence the manner in which the commissioner performs his or her official duties with the city with respect to NEXT.

But that is not the end of the inquiry. A city commissioner who solicited gifts for NEXT or BYA would still need to remain vigilant about whether the solicitation presents a conflict with respect to the third party whose gift is being solicited. If that third party ends up having business before the city, the commissioner's solicitation could result in a tendency to influence the manner in which the commissioner performs his or her official duties as to the third party.

Similarly, “[n]o official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.” *Id.* § 2-324(a)(8) (emphasis added). Again, to the extent that the city official solicited funds on behalf of NEXT or BYA from a person doing business with the city, that solicitation could be viewed as an attempt to secure a special consideration or preferential treatment for that person in violation of the code of ethics. Even were there no direct conflict, the solicitation could result in the “appearance of . . . giving or accepting preferential treatment,” “losing complete independence or impartiality of action,” or affecting adversely the confidence of the public or the integrity of the city government in violation of code of ethics. *Id.* § 2-323.

Finally, the Board notes that improper use of public office to secure donations to non-profit organizations can result in legal liability. For instance, the Michigan State Ethics Act contains a provision nearly identical to section 2-324(a)(4) of the city's code of ethics cited on the preceding page:

A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other thing of value for the benefit of a person or organization, other than the state, which tends to influence the manner in which the public officer or employee or another public officer or employee performs official duties.

MCL § 15.342(4). Violation of this statute, which applies to certain state officials but not those of the city of Birmingham, can result in a civil fine of \$500. *Id.* § 15.342(b)(3). In

other jurisdictions, public officials' more egregious attempts to secure donations have resulted in prosecutions for extortion.

HOLDING AND CONCLUSION

The Board of Ethics holds on the facts presented that the code of ethics does not bar a city commissioner from serving, by the appointment of the City Commission, as a member of the NEXT board of directors or the Birmingham Youth Assistance General Citizens Committee. Because that service is part of the commissioner's duties on behalf of the city, there is no conflict of interest per se.

But because members of the NEXT board of directors have a fiduciary duty to NEXT, a city commissioner serving on that board may not participate in consideration of any matter potentially adverse to the city, especially a request for funding, license, or any special consideration from the city, and the commissioner further is disqualified from participating in City Commission consideration of any matter involving NEXT.

Furthermore, a commissioner raising funds from or performing outreach with a third party on behalf of those organizations must use care to ensure that his or her efforts do not result in a conflict with regard to any business the third party may have before the city.

FURTHER GUIDANCE

The Board of Ethics does not have jurisdiction to render a binding opinion on matters not involving compliance with the code of ethics. But in its educational role and having received and considered a number of questions on the topic during the hearings on this case, the Board offers the following thoughts to aid the City Commission in its governance.

(1) The Board's response to many of the issues presented above might be different if the city commissioner had joined the community organization board or committee on his or her own volition rather than by assignment by the City Commission. The code of ethics is clear that city officials and employees may not use their official position to obtain a benefit for themselves or others. But the Board declines to opine further on how the Code of Ethics might limit or affect the conduct of a commissioner in that instance because the potential circumstances to be considered are so varied as to make the question unripe for current decision.

(2) The question was raised about whether the City Commission should ever appoint a commissioner to serve on the board or committee of a community organization. On one hand, appointment of a commissioner looks as if the city is favoring that organization over others. On the other hand, organizations like NEXT and BYA are important to the city and receive substantial support from it, while the city benefits from

the oversight provided by the assigned commissioners, who in turn keep the city better informed on how its tax dollars are being spent.

The balance to be achieved is a political question we leave to the City Commission. But the decision in this case makes clear that such an appointment comes with costs to the city. The city could be subjected to criticism for playing favorites. The individual commissioner may be disqualified from acting on matters before the city that concern the organization, contrary to the job the people elected the commissioner to do. And the commissioner would always have to remain vigilant about the potential for a conflict.

(3) A related question was whether, assuming the City Commission assigns a commissioner to sit on the board or committee of a community organization, the commissioner should be a voting member, a non-voting member, or merely a liaison. The answer depends on the city's goal in having the commissioner serve on the organization's board or committee. If the city needs or wishes to exert an amount of formal control over the organization, a seat on its board of directors would not be unreasonable, understanding that the commissioner has a fiduciary responsibility to the corporation. But membership on a corporation's board of directors brings legal duties, responsibilities, and potential liabilities for the commissioner that the city might not want its commissioner to assume or undertake. And given the holding in this case, membership on the board also disqualifies the commissioner from participating in the organization's request for support from the city and from participating in the city's consideration and action on that request.

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

Further, if merely exchanging information is the goal, maybe no formal participation by a city commissioner is needed at all. Rather, the city could require the organization to report periodically to the City Commission or city staff as a condition of receiving its grant from the city.

Thus, on this issue, the Board of Ethics would counsel the city to use the least intrusive means to achieve its goal. Doing so minimizes the prospect for a conflict of interest. The safest, cleanest way to avoid conflicts is for city commissioners to have no formal role with any organization that comes before the city. That is a policy question for the city to address.

(4) For more reading on this general topic, the Board of Ethics refers the City Commission to an excellent article published in 2008 by the Institute for Local

Government titled “Commitment to Non-profit Causes and Public Service: Some Issues to Ponder.” This article discusses a number of the concerns and questions raised in this case, including the importance of public perception, the price the city pays for having its members serve on community boards or committees, fund-raising for nonprofits, special problems involving governmental-affiliated non-profit organizations, and political questions that can arise from the relationships between governments and community organizations. The article can be found on line at:

https://www.ca-ilg.org/sites/main/files/file-attachments/resources__Everyday_Ethics_AugOctDec08_0.pdf

The Board appends the article in full with the permission of the Institute for Local Government, 1400 K Street, Suite 205, Sacramento, California, 95814-3916.

CONCLUSION

The Board of Ethics thanks the Birmingham City Commission for the opportunity to consult and comment on this important issue. The Board commends the commission and the city manager for raising it.

Approved:

John J. Schrot, Jr.
Acting Chairperson

James D. Robb
Member

Board member Sophie Fierro-Share did not participate in the consideration or decision of this case.