

**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.

<b>VI. PUBLIC COMMENT</b>
---------------------------

<b>VII. ADJOURN</b>
---------------------

The meeting was adjourned at 6:02 PM.

ca