

7 March, 2016

**To:** Ann Arbor City Clerk, steward of the Clerk's Report of Communications

**From:** Dave Askins, owner of property at 330 Mulholland Ave

**Re:** Official Communication to the City of Ann Arbor on Matter of Local Governance: Edition 1

Question: Should Ann Arbor City Council Members Accept Travel Reimbursements from the Ann Arbor Downtown Development Authority?

### **Background: Rules Committee**

The Ann Arbor City Council Rules Committee has wrestled for several months with the question of an Ethics Rule on gifts. The extended grappling is surely due in part to the fact that at least two members of the Committee have an undeniable stake in ensuring that their past conduct would not conflict with a future Ethics Rule. Specifically, Christopher Taylor and Sabra Briere (mayor and mayor pro tem, respectively) have accepted payments from the Ann Arbor DDA for travel/lodging expenses related to their attendance at conferences.

Even on its face, this kind of gifting arrangement between the DDA and the City Council appears problematic—because the Council has a statutory responsibility to appoint and remove DDA Board members, to approve the DDA's annual budget and to approve the hiring of a DDA Executive Director.

### **Fabric of the Community**

Now, the Council's responsibility for DDA oversight always faces an inherent challenge—to pierce the veil of tightly-woven socio/political fabric that binds the two separate bodies together.

There's nothing untoward about the fact that this fabric exists. It was not some secret conspiracy that wove it. Rather it is the natural product of a small town loom. It is likely unavoidable that the DDA Board in a city of 117,000 people will include friends of Council Members—personal and political.

What is avoidable, however, is the gusseting of this socio/political fabric—with travel and lodging reimbursements. It's reasonable to think that extra gusset is partly responsible for the willingness of Council Members to turn a blind eye to past and ongoing statutory compliance issues at the Ann Arbor DDA.

For example, why did it take legal action of a rank-and-file citizen in 2014 to establish that the DDA had committed violations of four different points of three state statutes? Is it not the City Council's job to hold the DDA accountable? What action has the Council taken in the wake of that court case, to make clear to themselves and the public that the Council will not tolerate statutory violations committed by DDA Board members and its Executive Director? Answer: The Council has cheerfully re-appointed some members of the Board, who participated in the violations, and who spent \$18,000 on a legal defense that was by any measure frivolous.

## **DDA Statutory Violations**

But consider that one of those four statutory violations helped shield travel reimbursements from public view. How? The DDA is required under statute to publicize all of its expenses on a monthly basis. The Court found the DDA in violation of that part of the statute. The subsequent dishonest spin that DDA Executive Director Susan Pollay has attempted to put on that particular violation has shrouded the plain truth underpinning the Court's finding. The simple truth is that the DDA was publicizing *none* of its expenses before legal action was threatened.

Pollay's misrepresentations, coupled with the dismal efforts of Ann Arbor's local "media," seems to have convinced some members of the community and the Council that the DDA somehow did not actually violate the law. Ward 2 Council Member Kirk Westphal has apparently stuck steadfastly to his assessment of the lawsuit as a problem with "note taking" and has resisted efforts encouraging him to correct his clear factual error expressed during comments at the City Council table.

The 2014 mayoral election might not have turned out much differently if Christopher Taylor's \$1,900 gift from the DDA had been publicized by the DDA in 2013 as required under state statute. Still, the 2014 mayoral campaign would have had a different feel, if Taylor's acceptance of a gift that size had been publicly known at the time.

So, what is the ongoing violation of the state statute by the DDA (which was not the subject of the previous lawsuit)? That violation involves a statutory requirement that descriptions, cost estimates and construction timelines for improvements in the downtown district be included in the Development Plan. The Ann Arbor DDA's 2003 Development Plan is undeniably deficient in this respect.

If the City Council were to approve an Ethics Rule that mitigates against Council Members accepting gifts from the DDA and other appointed bodies, then it would remove at least a couple of threads from the social fabric that binds the Council and the DDA Board together. And that might eventually lead to a Council Member showing some leadership—by putting a Resolution in front of the Council that would direct the DDA to put together a proper Development Plan that is compliant with the statute.

Creating a Development Plan that includes descriptions, cost estimates and construction timelines for improvements in the downtown district, would not just comply with the statute. It would provide the intended public benefit of the statute, which would allow us to understand in a reasonably objective and detailed way, how the DDA intends to spend the taxes it captures from jurisdictions that levy them. An additional lawsuit should not have to be filed to make that happen. It's within the power of Council Members to protect the DDA from that kind of lawsuit.

## **How Could Gifts from the DDA to Council Members be OK?**

Now, various kind of claims have been made that these kinds of gifts (from the DDA to Council Members) are somehow ethical. Those claims include the idea that everyone knows that DDA travel reimbursement is a perk of Council membership, and that it's only political enemies who would ever claim that there's anything wrong with it. Another common canard is that the DDA is actually just part of the City and that it's all one pot of money anyway, so what's the big deal?

On the first point, any number of community members who have no political friends or enemies still think there's clearly something wrong with City Council Members accepting gifts from the DDA. As an additional counterpoint, it's plausible that some Council Members might privately disapprove of reimbursement from the DDA, but opt to support it publicly, based on some misguided notion of political loyalty. It's the same kind of political loyalty that leads some Council Members to privately ridicule the personal qualifications of a City Council candidate, but to support them publicly, out of pure political loyalty.

On the second point, whatever you might believe about the relationship between the DDA and the City, they are undeniably separate enough for the two entities to form a contractual relationship with each other—for management of the public parking system. And the news hook here is that the DDA seems to be expecting the City to reopen that contract sometime soon.

### **Implications of Contractual Relationship**

The contractual relationship is made possible by the fact that both the City and the DDA are public bodies corporate. And this contractual relationship can give some sober insight into the appropriateness of the DDA's reimbursement of Council Members for their travel expenses.

Attorneys are prevented by Rule 1.8 of the American Bar Association's Professional Standards from accepting payment of their fee from anyone other than their client. And they are also prevented, by Rule 1.7, from representing both sides to a contractual arrangement. If analogy were drawn to those rules—based on the duty of a Council Member to “advocate” for the city's interest—then it is clear that travel reimbursements to Council Members from the Ann Arbor DDA should be considered unethical.

But there's an escape clause in the rules that provides those relationships are permissible *if* adequate consultation and agreement are obtained. How might it apply to this scenario? What would it mean for a Council Member to obtain consent from "the city." Does that mean from other Council Members? the city administrator? voters? It's impossible to obtain the kind of consent that could provide any clear consensus among reasonable minds that the arrangement were ethical.

Of course, City Council Members are not elected to provide legal representation. Even though a Council Member might earn a living as a lawyer, that person does not act as a lawyer in their formal actions as a Council Member. So a simple-minded way to counter the argument based on the ethical requirements of lawyers would be to say: Council Members aren't lawyers.

That attempted counter ignores the basic principles that underlie centuries-long thought in the legal profession, which lead to the conclusion that these kind of relationships are unethical. Those principles include the idea that it is not desirable to create situations in which reasonable doubt will naturally arise about whose side a person is actually on. Don't those same principles apply to elected representatives?

## **Practical Oversight**

Beyond the purely ethical issue, acceptance by Council Members of travel reimbursements from the Ann Arbor DDA creates an unnecessary additional burden for adequate oversight. It should be easy for any member of the public to check that a public official is not double-dipping from multiple sources of reimbursement for travel.

For an Ann Arbor City Council Member like Briere, who sits as the Council representative on the Planning Commission, at least three potential sources of travel reimbursement funds are currently available: a City Council budget line item, the Planning Commission and the Ann Arbor DDA. All of those sources would need to be checked in order to verify that no double-dipping is taking place. If Council Members had only a single source of funding (their own budget line item), then checking for possible double dipping would be simpler.

## **Conclusion**

Based on several ethical considerations and practical challenges of oversight, it is clear how a City Council Ethics Rule on gifts should be formulated. The rule should make plain that reimbursement of any kind of travel, lodging, conference fees that might be made to a Council Member must be made only with the approval of the Council itself, drawing upon a city budget line included for that purpose.

Adopting such a rule would convey to the public the Council's clear commitment that it will not allow the warps of our community's fabric tie their hands on ethical issues.