

AGENDA ITEM SUMMARY

July 26, 2016

City Council

STAFF

Carrie Daggett, City Attorney

SUBJECT

Resolution 2016-058 Accepting Advisory Opinion and Recommendation No. 2016-01 of the Ethics Review Board.

EXECUTIVE SUMMARY

The purpose of this item is to submit the opinion of the Ethics Review Board to Council for its consideration and possible approval.

STAFF RECOMMENDATION

Not applicable.

BACKGROUND / DISCUSSION

Under City Code Section 2-569, City Councilmembers may present to the Council Ethics Review Board inquiries regarding the application of state or local ethical rules to actual or hypothetical situations involving potential conflicts of interest. The Ethics Review Board met on July 12, 2016, July 19, 2016, and July 25, 2016, to review and approve the draft Ethics Opinion No. 2016-01, with continued consideration of an inquiry by Councilmember Campana requesting that the Board consider and provide an advisory opinion regarding whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to an applicant), so long as they do not personally appear before the board to advocate on behalf of another person, as needed. Any other discussion which needs to take place concerning Board consideration of the same question as it relates to Councilmembers.

Section 2-569(c) provides for the opinions and recommendations of the Board to be submitted to the full Council for Council consideration and approval.

Ethics Review Board Meeting Minutes
July 12, 2016
4:00 p.m.

Members in Attendance: Board members Ray Martinez, Gino Campana and Kristin Stephens

Also Present: Kevin Jones, Fort Collins Chamber of Commerce; Vicky McLane; Cari Brown; Gina Janett; J Beatty; Wanda Winkelmann, City Clerk; Rita Jordan, Transportation Board; Mike Gebo, City of Fort Collins; and Tom Leeson, City of Fort Collins.

Staff in Attendance: Carrie Daggett, City Attorney; Brad Yatabe, Asst. City Attorney; Jeanne Sanford, Paralegal; Cary Alton, Paralegal

A meeting of the City Council Ethics Review Board (“Board”) was held on Tuesday, July 12, 2016, in the City Attorney’s Office Large Conference Room, to consider the following issue:

That the Board consider and provide an advisory opinion of whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to any applicant), so long as they do not personally appear before the board to advocate on behalf of another person. The inquiry also requested that the Board consider the same question as it relates to Councilmembers.

The meeting began at 4:10 p.m. The Board reviewed the Agenda which contained the following items:

1. Appointment of Chair for Meeting of the Ethics Review Board for July 12, 2016, Meeting.
2. Consideration of an inquiry by Council member Campana requesting that the Board consider and provide an advisory opinion regarding the question of whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to an applicant), so long as they do not personally appear before the board to advocate on behalf of another person. The inquiry also requested that the Board consider the same question as it relates to Councilmembers.
3. Other Business.
4. Adjournment.

The Board discussed appointment of a chairperson for the meeting. Councilmember Campana nominated Councilmember Ray Martinez to chair the meeting. Councilmember Stephens seconded the nomination and Councilmember Martinez accepted the role of chairperson with the unanimous consent of the Board.

The Ethics Review Board Chair Martinez stated that this is an Ethics Review Board meeting on July 12, 2016 4:00 p.m., and declared that all members of the Board were present.

Chair Martinez summarized the specifics of the issue before the Board and City Attorney Daggett summarized the materials which included the Agenda Item Summary and supporting opinions adopted by the Ethics Review Board. City Attorney Daggett indicated that the Agenda Item Summary runs through the relevant Charter provision Article 4, Section 9(e)(3) which relates to actions that officers/employees must take once they have determined a conflict exists and have disclosed the conflict. Also provided are prior adopted Ethics Review Board opinions adopted, namely 91-3, 98-53 and 91-2. It was noted that the City Code prohibits Councilmembers from representing any person or interest before the Council or a City board.

Councilmember Campana elaborated on the request by indicating that historical interpretation of the limitation on appearances by board members has been that there is a conflict if one participates in an official capacity as a board member, not as a citizen or professional at large. Councilmember Campana commented that this has been under review recently. Councilmember Campana was phoned by a member of the Landmark Preservation Commission who reported that several Commission members said that if they can't do work for the City, even after recusing themselves on a project that they worked on, then they cannot serve on the Commission. Councilmember Campana stated this presents a problem for the City where experts are needed on a board. Councilmember Campana stated the question, why are we interpreting the limitation differently now as opposed to the last 20 years? Councilmember Campana noted it was unwritten policy in board member training and that stipulation said that, for example, if you are a Planning & Zoning member and a professional architect in the community and you are working on a project that is going before the Planning & Zoning board, you recuse yourself from that decision, you don't present in front of the board, but certainly a member from your firm can present before the board. Councilmember Campana stated he believed the situation that triggered this discussion was a little more defined in that if you are a single person office, if you recuse yourself from that decision, can you represent your work to that board that you're on? Historical interpretation has been called into question. Councilmember Campana stated "influencing a decision" in the official capacity of that board member seems to be a differentiating sentence that lays out the intention. Councilmember Campana stated he agreed with City Attorney Daggett that it does not explicitly say you can. It would be an option at this point to get an opinion out of the committee, supported by Council, and work on clarity of the Charter at a later date.

City Attorney Daggett added it has been a specific aspect of the issue and the reason this conversation started is that there are times when materials are presented in writing and the question was if someone showed up and talked to the board, that is obvious, but if someone wrote a report and presented it to the board, that is not spoken communication but a written report that goes to the board's decision and is attempted to sway or persuade the board, so the

real question under the Charter, is that different? The Charter does not reference those distinctions.

Councilmember Campana stated he believes the hinge point is, are you influencing in your official capacity as a board member? Councilmember Campana stated the suggestion of not presenting to the board was to try to eliminate perception of influence, but believed the way the language is written that you could personally present to the board, because you are participating outside your capacity as an official board member. Councilmember Campana believes the City took a conservative approach previously to eliminate any gray area. Councilmember Campana stated it was clear to him that if you recuse yourself, you are eliminating yourself from that official capacity on that board.

Chair Martinez asked, if you recuse yourself, can you actually participate as an expert? Chair Martinez stated the board has an obligation to base decisions on facts and not who is presenting those facts.

Councilmember Stephens noted that expertise is needed as it is not so cut and dry. She asked if written materials are not explicitly discussed in the Charter.

City Attorney Daggett stated that the prior Ethics Opinions specifically discussed not representing other persons before the board. The Ethics Review Board opinions attached to the AIS put the standard out there. City Attorney Daggett stated the prior Opinions indicate that you could talk to your board if it is about your personal matters, but you cannot do it not in a representational capacity. Looking at Opinions 98-53 and 91-3, 91-2, City Attorney Daggett stated they basically say if you are appearing, for example, before Planning & Zoning Board to represent some other person, that would be prohibited under the 1998 decision, however, the discussion there is about physically appearing and standing in front of the board to present, so the issue coming up more recently is, is it okay for written materials to be submitted to the board? Does it make it okay that a boardmember is not standing in front of his or her board?

Councilmember Campana stated he disagrees with the 1998 opinion. Councilmember Campana stated one cannot present to the board as a professional. Councilmember Campana stated he was confused how that decision was ever made, and stated there was a gap between discussion and opinion and there was a need to focus on the intent behind the Charter provision.

City Attorney Daggett read aloud the Charter provision.

Councilmember Campana stated it's the decision you cannot participate in. Councilmember Campana called attention to two things: 1) the language states that you cannot participate in the manner as an officer/employee and 2) he believes they specifically left out from the prohibition participating as a "professional" or "citizen" and he believed that was intentional, otherwise a boardmember could not work in the City.

City Attorney Daggett pointed out there are a lot of situations where professionals could have others from their firm participate and present to the board they serve on, where the boardmember doesn't have a direct role and is not authoring the documents.

Councilmember Campana agreed, but except for one-person firms. Councilmember Campana stated this has happened historically a couple times with special permission. He fears interpretation presented today does not even allow that. Councilmember Campana stated he wanted to go back to the Charter provision, figure out intent and interpretation. Councilmember Campana believed the Charter was attempting to be conservative where it stated one could not participate in the decision, as opposed to the hearing.

Chair Martinez noted he was hung up on the phrase, "otherwise participating in decision". When you recuse yourself, not an officer or employee, only thing sticking out "attempting to influence" but who defines what that is?

City Attorney Daggett indicated the question is raised here of physical presentation vs. written materials and what is that meaning? That goes towards the interpretation of the term "attempting to influence" and that is a key question for this discussion.

Chair Martinez asked for clarification on state law pertaining to that issue.

City Attorney Daggett replied there was no case law interpreting the Charter's use of the term "attempting to influence." Where there is ambiguity in the Charter that leaves some room for Council to adopt an interpretation so long as it is a reasonable attempt to interpret the language. City Attorney Daggett stated that in this case the Council may reasonably believe the language is ambiguous and that interpretation was needed. One source of ambiguity has to do with what rules of interpretation apply and how they would operate. City Attorney Daggett discussed the Last Antecedent Rule and the reason why it is not absolutely clear how that would be applied to the Charter provision being considered.

Councilmember Campana agreed.

Councilmember Stephens asked Councilmember Campana if his main concern is the individuals who are sole proprietors from being excluded.

Councilmember Campana, answered that historically, one would fill out a conflict of interest form, recuse from voting on it as a boardmember, and have someone from your firm handle it for the applicant/project. Councilmember Campana stated the issue we are having is to make clearer for boards and commissions how this applies to them and what they can do, in order to avoid panic or unnecessary resignations. Councilmember Campana explained that is why the Ethics Review Board needed to meet and hash this out.

City Attorney Daggett replied that where we have Ethics Opinions adopted and where the City Attorney's Office is involved in discussing with board members on interpretation, the attorneys look to those Ethics Opinions as a source of guidance, and is not in a good position to overlook

the things that Council has approved and adopted in the past with regard to interpretation. Because of this, if the Ethics Review Board of Council would like a different outcome, it is helpful for the Board to consider an issue and recommend an updated Ethics Opinion to Council for adoption. So it is probably helpful for the Board to be looking at this question to evaluate it and establish what is probably more definitive guidance for board members to rely on. City Attorney Daggett stated that Council can choose to establish limitations on boardmembers. Council may adopt additional guidelines or limitations in the City Code that do not require Charter changes so long as they are stricter than the Charter, not more lenient.

Councilmember Campana inquired as to whether the approach he has been describing would require to the Ethics Review Board to interpret Charter differently from past Boards/Councils.

City Attorney Daggett affirmed that to be the case.

Councilmember Campana further asked if there is enough from the discussion to move forward if the Board supports that.

City Attorney Daggett replied that she felt the Board would be in a position to go in that direction if that is the route the Board determines to be appropriate.

The Board then discussed training for boardmembers and how that was handled. City Clerk Winkelmann discussed the training videos currently used and stated they have not be updated for several years, and that there has been discussion of how to update and make them more user friendly for the boardmembers.

Councilmember Campana agreed the videos should be changed and improved.

Councilmember Campana and Chair Martinez discussed “attempting to influence” and if you have recused yourself upon a conflict, you are not participating so the Charter is clear enough. Councilmember Campana suggested a clarification about rendering expertise and knowledge, but not participating in decision. Councilmember Campana said his suggestion on this issue is that it should be covered in the board’s manual where you don’t present yourself before your board unless you are the only one who could, and in that event you get special permission. Chair Martinez stated you could get a form of variance in that instance. Councilmember Campana stated your firm appearing before the board occurs frequently, but hardly ever if you had to personally present in front of your board in the case of hardship.

The Board and City Attorney Daggett discussed special circumstances for variances and Councilmember Campana noted he believed there were occasions of special permission given by Council in the past.

Councilmember Campana added this should pertain to Councilmembers as well as board members.

City Attorney Daggett then summarized what she had heard on the issue. The Board believes the Charter language is actually narrower than it has sometimes been interpreted and actually goes to participation in a matter as an officer/employee rather than any capacity.

Councilmember Campana added this should relate to participation in the decision.

City Attorney Daggett noted that attempting to participate in a discussion has been viewed as attempting to influence it, so it is hard to not be attempting to influence and be a part of the discussion.

Councilmember Campana noted that discussion is usually part of the decision, and Chair Martinez agreed.

Councilmember Stephens questioned whether the Board needed to explicitly mention the discussion since it is usually part of the decision.

City Attorney Daggett stated the focus is on the capacity of the person and what role they are in if they are out in the audience participating on behalf of an applicant, and stated she understood the Board's position to be that participating in that way is not participating as an officer/employee.

City Attorney Daggett resumed her summary, "Participating in discussion" probably is "attempting to influence." It is hard to not attempt to influence and still be part of the discussion. So, focus should be on the capacity of the person and what role they are in. If one is in the audience presenting with an applicant, then one is participating on behalf of the applicant, and not participating as an officer/employee. The Board is interested in seeing follow-up discussion by Council of more narrow limitation than in the Charter and what Council would want to institute in the Code to create limitations on board member activities, including a potential for a variance or some other special process for board members who are seeking to participate in a process in front of their own board in a representational capacity. City Attorney Daggett stated that she was unclear whether the Board had completed its discussion of the last agenda point about the limitations on activities of Councilmembers.

Councilmember Campana stated he thought it best not to make a distinction. Councilmember Campana then asked City Attorney Daggett if she felt there is a distinction.

City Attorney Daggett stated there is state law on members of a local governing body being held to a stricter standard.

The Board members stated they were okay with that approach. It was further discussed that state law suggests Council members should be held to a stricter standard when presenting to Council. Councilmembers Campana and Stephens agreed. Chair Martinez asked for clarity on the state law and how the idea of "representing an interest" would be interpreted.

City Attorney Daggett stated that there is some room for distinctions to be made in applying that term. There is a difference, for example, if an architect draws up a plan that is then used for some later step in a process, as compared to the architect responding to questions about how the plans relate to the land use code. The latter would pretty clearly be “attempting to influence” while in some cases the former might not be, depending on the circumstances.

Councilmember Campana agreed that it would be helpful to provide greater clarity about that distinction.

The Board unanimously affirmed City Attorney Daggett’s summary of the issues.

City Attorney Daggett indicated she would draft an opinion, which would be provided to the Board as a public document for comment, and that the Board will review and discuss any modifications. A follow-up meeting was proposed for after the Legislative Review Committee meeting on Tuesday, July 19, 2016, in the City Manager’s Commons Conference room, 2nd floor. Once the Board is satisfied with the opinion, City Attorney Daggett will get the issue on the next City Council agenda for Council review and consideration of a resolution adopting the opinion. For the record, there was a consensus by all Board Members on what City Attorney Daggett described.

Chair Martinez noted he would like a copy of or link to the training video discussed.

Other Business: City Attorney Daggett discussed updating the training. She would like to see an updated approach to perhaps using “Ted Talks” style to the videos to shorten them down and make them more efficient.

Councilmember Campana affirmed that on these quasi-judicial boards that one is “thrown in” and noted training is more important for some board than others. He added it might be beneficial to require a couple of meetings with a coach as training.

Councilmember Stephens agreed and added that it’s especially helpful to make people clear about conflicts.

Meeting Adjourned at 4:58.

Carrie M. Daggett, City Attorney

Ethics Review Board Meeting Minutes
July 19, 2016
4:45 p.m.

Members in Attendance: Board members Ray Martinez, Gino Campana, and Kristin Stephens; and Board Alternate Ross Cunniff.

Also Present: Kevin Jones, Fort Collins Chamber of Commerce;

Staff in Attendance: Carrie Daggett, City Attorney; Brad Yatabe, Asst. City Attorney; Jeanne Sanford, Paralegal;

A meeting of the City Council Ethics Review Board (“Board”) was held on Tuesday, July 19, 2016, in the Commons Conference Room, to continue consideration of the following issue:

That the Board consider and provide an advisory opinion regarding whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to any applicant), so long as they do not personally appear before the board to advocate on behalf of another person. The inquiry also requested that the Board consider the same question as it relates to Councilmembers.

Ethics Review Board Chair Martinez called the meeting to order at 4:45 p.m. The Board reviewed the Agenda which contained the following items:

1. Review and approval of the July 12, 2016 Minutes of the Ethics Review Board.
2. Review and Approval of Ethics Opinion 2016-01, with continued consideration of an inquiry by Councilmember Campana requesting that the Board consider and provide an advisory opinion regarding whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to any applicant), so long as they do not personally appear before the board to advocate on behalf of another person. The inquiry also requested that the Board consider the same question as it relates to Councilmembers
3. Other Business.
4. Adjournment.

Ethics Review Board Chair Martinez stated that this is an Ethics Review Board meeting on July 19, 2016 4:45 p.m., and the Board took a roll call for all present, including Councilmember Ray Martinez, Councilmember Gino Campana, Councilmember Kristin Stephens, and Councilmember Ross Cunniff (alternate); Carrie Daggett, City Attorney; Brad Yatabe, Assistant City Attorney; Jeanne Sanford, Paralegal; and Kevin Jones, Fort Collins Area Chamber of Commerce.

The Chair stated the first item was to approve the July 12, 2016 Minutes of the Ethics Review Board.

Councilmember Campana indicated he had some comments on the Minutes. Mr. Campana stated on page one, second paragraph under staff attendance of the Minutes, it was important to point out “so long as they do not personally appear before the Board to advocate on behalf of another person”, that was the initial intent to review, but thinks the way the Opinion was written, we are not addressing that.

Councilmember Campana also stated on page two, third paragraph down in the Minutes, the phrase “several members of Landmark Committee phoned him”, may have been confused. One member (the Chair) phoned him who told him five other members were thinking of quitting because of discussion about the interpretation of the Charter.

Councilmember Campana also stated that on page three, sixth paragraph down, beginning with, “Councilmember Campana called attention to two things”, he thought he had talked about the capacity of the board members but also that there was a lot of discussion about decision vs. discussion (by board members). He noted that he couldn’t find anywhere in the Minutes where that discussion was captured. Councilmember Campana felt that was an important point.

City Attorney Daggett stated she believed that was captured on the top of page four.

Councilmember Campana agreed but stated he would like to see more on capturing the discussion between discussion and decision. Mr. Campana stated the other point he was trying to make was the distinction between discussion and decision.

Chair Martinez asked Councilmember Campana how he would like to capture that, if it was by re-listening to the recording?

Councilmember Campana indicated he would like staff to re-listen to the recording and would request that the Minutes not be approved tonight.

City Attorney Daggett stated she could edit the Minutes so the Board could read revisions right now, and then the Board might be able to approve on everything in the Minutes other than the last point. She noted her concern on the last point was in trying to make sure the Minutes were accurate to the recording, and that staff could go back and try to find more content in the recording if something had been omitted.

Councilmember Campana stated he proposed the Board not approve the Minutes and that they should be re-addressed to try to capture the key points to the opinion.

City Attorney Daggett asked about the items to be reviewed – first whether it was requested that staff clarify the initial point about personally appearing before the board to advocate for another person.

Councilmember Campana stated that was not a point that need to be addressed, and stated that he would like to better capture the issue of discussion vs. decision and the reason for the emphasis is that if a board member states a conflict, recuses himself, then presents before the board, that board member is presenting in the discussion, not the decision of the board. To support that opinion, it must be captured in the Minutes.

City Attorney Daggett commented that conceptually she may have missed something in the distinction Councilmember Campana was noting about what capacity that board member is operating in. City Attorney Daggett further stated that the distinction of what capacity a board member is operating in makes the other questions less significant in terms of interpreting the Charter. City Attorney Daggett stated that by saying that only as a Landmark Preservation Commission member one cannot participate under the Charter, then the distinction about them appearing before the Commission (to represent a party) is no longer addressed in the Charter.

Councilmember Campana stated he agreed that is where he thought the Board was going in the last meeting, but the Opinion does not read that way to him. He noted that, for example, where you have your first initial check that, okay, I am not acting as a board member or decision maker, then the rest does not apply to me, I am just a citizen, we need to adjust the Opinion so this is a moot point.

City Attorney Daggett asked if the Minutes were a concern.

Councilmember Campana replied that there needs to be more robust review to ensure that the Minutes capture what the Board dialogue was.

City Attorney Daggett stated that staff would go back and listen to the recording and look for more detailed discussion.

Chair Martinez stated the Board would hold off approving Minutes until they were changed to address Councilmember Campana's concerns.

Chair Martinez presented the second agenda item – the review of City Attorney Daggett's draft Ethics Opinion 2016-1, which had been presented to the Board. Chair Martinez asked the Board if everyone had a chance to read it.

Councilmember Stephens replied she had, and that the Opinion captured a lot of what was discussed. She asked Councilmember Campana to state where he had a problem.

Councilmember Campana read the bottom line, at page two, second sentence of the Opinion, starting with “Board recommends the City adopt City Code provisions limiting board members from other participation in those decisions, in a personal or representational capacity except where a variance for special hardship has been granted.” Mr. Campana stated he thought, in his mind, that it was mixing two different ideas the Board had discussed. One was if there was a conflict, they should not participate in any capacity in the decision and secondly, once a board member has recused himself/herself as a decision maker, they should be allowed to participate via their work without a variance, but if they want to present personally to their board, there would be a variance option process.

City Attorney Daggett clarified this was a point she didn’t see come through in discussion (so maybe more discussion would be beneficial) -- the original question about whether there is a difference between showing up at a board meeting and presenting and writing a written piece and giving it to the Board as an item for consideration, but not verbally – that was the original question that sparked the whole discussion.

Councilmember Campana asked City Attorney Daggett what her understanding of the Opinion was.

City Attorney Daggett stated her understanding of the Opinion from the discussion was that the Board is still viewing the need to limit board member appearances in a broader sense - provided there would be a process for getting an exception or variance in hardship cases.

Councilmember Campana asked about the term “broadly”, meaning their work or personally appearing?

City Attorney Daggett replied yes, their work in the sense of advocacy material prepared for the Board in contrast to somebody, for example an engineer who designed something, but is not a front and center part of policy discussion or advocacy regarding the land use code, but just part of the work force who created the project. That was the distinction she was trying to make.

Councilmember Campana stated that was not his take from the meeting and a critical point of why the Board was here. He thought discussion revolved around the first test: Do you have conflict? If so, note that, recuse yourself as a board member, then the balance of that provision does not apply. You could present yourself personally and your work. However, the Board felt it would be better if you did not present your work personally to your board, but in the event of a hardship where you are sole proprietor for example and could not get someone else to present your work, you could go through a variance process to get approval to present your work. That is different than what you are saying.

City Attorney Daggett stated that the Opinion was on track through the point of “once there is not a Charter provision that creates an issue, because you are not acting as a board member now, you are acting as a professional,” and that is the discussion about Council establishing standards

relating to that, that is the place where Councilmember Campana had different expectations than what is in the draft Opinion. She noted that she may have missed his intended meaning, but does think there was some discussion at the end of the meeting that may have confused the issue.

Chair Martinez stated that it was just explained just now and asked if City Attorney Daggett understood.

City Attorney Daggett stated that when she asked for confirmation from the Board last week, the outline she had given to confirm the Board's intention must have not been clear enough on this issue. City Attorney Daggett indicated she wanted to confirm that the points were clear.

Chair Martinez asked City Attorney Daggett about today.

City Attorney Daggett stated she understood what Councilmember Campana was saying.

Chair Martinez asked if the Board concurred.

Councilmember Stephens asked for clarification that work could come before the board so long as they are not presenting.

Councilmember Campana replied, yes, for example, if a member of the Landmark Preservation Commission was working on a project as a lead on a report, would say he has a conflict and recuses himself, his work could be presented to the Commission, but if he personally wanted to present, he would need a variance.

Chair Martinez stated that variance would need boundaries.

Councilmember Cunniff stated the variance would need to define specifically some parameters around a hardship.

Councilmember Campana stated historically that has happened before based on what board members have told him. Councilmember Campana elaborated by saying if someone in your office is ill, the key to this is once a conflict has been declared and you recuse yourself, there should not be a limitation on your ability to present to that board.

Councilmember Cunniff supported authoring of written materials, but appearing, advocating and answering questions on a project before the board should only be in extreme circumstances of hardship due to potential of appearance of influence on the board and to avoid fears by competitors that there is a special advantage here.

Councilmember Campana agreed and stated that he would like to capture this in the Opinion.

Chair Martinez asked how to define what a variance is.

City Attorney Daggett stated her Opinion probably did not capture what the Board was looking for in basic terms. Her recommendation would allow a board member as a professional to be

involved in project, communicate in writing, prepare reports, etc., but not appear personally before the Board.

Chair Martinez added, once they have recused themselves.

Councilmember Campana stated he thought it would be put in the Opinion, you are allowed to present personally, but address it in the Boards and Commissions Manual that board members shouldn't present before their own board without a variance.

City Attorney Daggett stated that the option of the Boards and Commissions Manual was discussed on July 12th, and suggested it might be preferable for sake of transparency to be in the Code as opposed to the Boards and Commissions Manual.

Councilmember Campana stated he was okay with that but didn't think that's what he took away from the meeting last week.

City Attorney Daggett stated the Opinion clearly needed to be revised. When it gets to Council, it will be decided if it will be a Code provision or Manual change.

The Board members then stated it was their strong opinion to adopt a Code provision.

City Attorney Daggett stated that the Board's input would provide good direction in revising the Opinion. There are key things which are substantially different:

1. Expectation that Code provisions would affirmatively say board and commission members can participate in projects before their boards where a conflict exists and they have recused themselves, so long as they don't personally appear before the board.

Councilmember Cunniff stated this will be a little tricky. He asked that this structure be limited to allowing authoring of work product and not creating new advocacy letters to the board. He noted it is important to separate out work product from advocacy.

The Board agreed.

City Attorney Daggett discussed the process and timing to turn out a new opinion fairly quickly so it could be reviewed and discussed by the Board prior to the Council meeting next Tuesday. A meeting was proposed for Monday, July 25, 2016 at 9:30 a.m., in the City Attorney's Large Conference Room. All agreed to the meeting time, date and place.

Councilmember Campana stated he would like to discuss something further. On the third point in the Opinion, he had a concern and question with, for example, suppose you have a

Councilmember who is an architect and the firm presents their work. He was concerned that the way the Opinion is written precludes a Councilmember from doing that.

City Attorney Daggett replied someone from the firm could, since the prohibition is on the Councilmember representing any person or interest.

Councilmember Campana added that we need language that clearly states that, because it is confusing the way it reads. Councilmember Campana further asked about presentations by the Councilmember's firm.

City Attorney Daggett said they should be able to present and additional clear language may be helpful on that.

Councilmember Campana stated the firm should be able to present.

City Attorney Daggett stated there will be a follow-up meeting on Monday, July 25, 2016, at 9:30 a.m. and that she would get out a revised opinion circulating as early as she can, along with draft revised Minutes.

Councilmember Campana stated that would be great.

Chair Martinez asked if there was any other business.

Chair Martinez presented the motion to adjourn and the Board was all in favor.

Meeting adjourned at 5:16 p.m.

Carrie M. Daggett, City Attorney

RESOLUTION 2016-058
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING ADVISORY OPINION AND RECOMMENDATION
NO. 2016-01 OF THE ETHICS REVIEW BOARD

WHEREAS, the City Council has established an Ethics Review Board (the “Board”) consisting of designated members of the City Council; and

WHEREAS, the Board is empowered under Section 2-569 of the City Code to render advisory opinions and recommendations regarding actual or hypothetical situations of Councilmembers or board and commission members of the City; and

WHEREAS, the Ethics Review Board met on July 12, 2016, July 19, 2016, and July 25, 2016, to review and approve the draft Ethics Opinion 2016-01, with continued consideration of an inquiry by Councilmember Campana requesting that the Board consider and provide an advisory opinion regarding whether under the City Charter board and commission members, after declaring and disclosing a conflict of interest in a matter, may participate in that matter on behalf of an interested stakeholder (for example, as a technical professional providing advice to an applicant), so long as they do not personally appear before the board to advocate on behalf of another person, as needed, and how the same question applies to Councilmembers; and

WHEREAS, the Board has issued an advisory opinion with regard to this matter concluding that in the case of a conflict of interest the Charter prohibits City board and commission members from participating in any way as a board or commission member in the decision of interest, but allows participation in a professional or personal capacity; and

WHEREAS, in light of this, the Board has also recommended that the Council adopt Code language to establish and clarify the limits on board and commission member participation in as a representative and in a personal capacity, which in general should allow participation other than direct advocacy on behalf of others, and provide for a variance process for consideration of exceptions to this limit on direct advocacy in cases of special hardship, and intends to further review this issue and recommend Code amendments for Council consideration; and

WHEREAS, the Board has further concluded that a board or commission member is not prohibited from having a financial interest in a sale of services to the City unless her or she supervises the services on behalf of the City, and recommended that Council propose a Charter change in this regard; and

WHEREAS, the Board has also reaffirmed that stricter limits apply to Councilmembers, in light of current Code and statutory provisions, and concluded that Councilmembers are precluded from personally representing any person or interest in front of the Council or any City board or commission, and intends to further review this issue and recommend Code amendments for Council consideration; and

WHEREAS, Section 2-569(e) of the City Code provides that all advisory opinions and recommendations of the Board be placed on the agenda for the next special or regular City Council meeting, at which time the City Council shall determine whether to adopt such opinions and recommendations; and

WHEREAS, the City Council has reviewed the opinion of the Board and wishes to adopt the same.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Opinion No. 2016-01 of the Ethics Review Board, a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A," has been submitted to and reviewed by the City Council, and the Council hereby adopts the opinion contained therein.

Passed and adopted at an adjourned meeting of the Council of the City of Fort Collins this 26th day of July, A.D. 2016.

Mayor

ATTEST:

City Clerk

2016 -1
OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS

July 25, 2016

The City Council Ethics Review Board (“the Board”) met on July 12, 19 and 25, 2016, to consider and render an advisory opinion on a question submitted to the Board by Councilmember Gino Campana. The question presented is the extent to which a member of a City board or commission (together referred to as “boardmember”) may take action as a private citizen (and not as a boardmember) to influence the decision of his or her board after declaring a conflict of interest in that decision. The pending inquiry also requests review of the question as it relates to City Councilmembers.

Bottom Line.

- The Board interprets Article IV, Section 9(b)(1)c to prohibit an officers or employee from providing services to the City when he or she supervise those services for the City.
- The Board interprets Article IV, Section 9(b)(3) of the City Charter to prohibit any officer or employee of the City from acting **as an officer or employee** in connection with a decision in which he or she has a financial or person interest. The Board recommends that Council adopt City Code provisions to establish and clarify the limitations on direct communications by boardmembers in a representative capacity in regard to that decision, as well as a variance procedure to allow the granting of variances for more direct involvement in the case of a special hardship (as outlined on pages 5 and 6).
- The Board recommends that City Councilmembers continue to be limited from representing any persons or interests before the Council or other City board or commission, but notes that this limitation does not prevent a Councilmember’s firm from appearing before and advocating to Council in a matter, so long as the Councilmember has recused himself or herself from the matter and does not personally participate in it.
- The Board intends to consider specific Code amendments related to the Code-related items, in order to make specific recommendations to Council.

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Background.

In contrast to the questions commonly before the Ethics Review Board for consideration, this inquiry relates not to whether a conflict of interest must be declared, but rather to what limits apply to a boardmember or Councilmember once a conflict has been declared.

Article IV, Section 9(b) of the City Charter states as follows (*emphasis added*):

...

(b) Rules of conduct concerning conflicts of interest.

(1) Sales to the city. No officer or employee,¹ or relative² of such officer or employee, shall have a financial interest in the sale to the city of any real or personal property, equipment, material, supplies or services, except personal services provided to the city as an officer or employee, if:

- a. such officer or employee is a member of the Council;
- b. such officer or employee exercises, directly or indirectly, any decision-making authority concerning such sale; or
- c. in the case of services, such officer or employee exercises any supervisory authority over the services to be rendered to the city.

(2) Purchases from the city. No officer, employee or relative shall, directly or indirectly, purchase any real or personal property from the city, except such property as is offered for sale at an established price, and not by bid or auction, on the same terms and conditions as to all members of the general public.

(3) Interests in other decisions. Any officer or employee who has, or whose relative has, a financial or personal interest in any decision of any public body of which he or she is a member or to which he or she makes recommendations, shall, upon discovery thereof, disclose such interest in the official records of the city in the manner prescribed in subsection (4) hereof, and shall refrain from voting on, attempting to influence, or otherwise participating in such decision in any manner as an officer or employee.

(4) Disclosure procedure. If any officer or employee has any financial or personal interest requiring disclosure under subsection (3) of this section, such person shall immediately upon discovery thereof declare such interest by delivering a written statement to the City Clerk, with copies to the City Manager and, if applicable, to the chairperson of the public body of which such person is a member, which statement shall contain the name of the officer or employee, the office or position held with the city by such person, and the nature of the interest. If said officer or employee shall discover such financial or personal interest during the course of a meeting or in such other circumstance as to render it practically impossible to deliver such written statement prior to action upon the matter in question, said officer or employee shall

1 The Charter defines “officer or employee” to mean “any person holding a position by election, appointment or employment in the service of the city, whether part-time or full-time, including a member of any authority, board, committee, or commission of the city, other than an authority that is:

- (1) established under the provisions of the Colorado Revised Statutes;
- (2) governed by state statutory rules of ethical conduct; and
- (3) expressly exempted from the provisions of this Article by ordinance of the Council.”

Charter Art. IV, § 9(a).

2 The Charter defines “relative” to mean: “the spouse or minor child of the officer or employee, any person claimed by the officer or employee as a dependent for income tax purposes, or any person residing in and sharing with the officer or employee the expenses of the household.” Charter Art. IV, § 9(a).

immediately declare such interest by giving oral notice to all present, including a description of the nature of the interest.

(5) Violations. Any contract made in violation of this Section shall be voidable by the city. If voided within one (1) year of the date of execution thereof, the party obtaining payment by reason of such contract shall, if required by the city, forthwith return to the city all or any designated portion of the monies received by such individual from the city by reason of said contract, together with interest at the lawful maximum rate for interest on judgments.

Past ethics opinions evaluating the Charter limitations on boardmembers with a conflict of interest have distinguished between representing the interests of others before a boardmember's board (not allowed where a conflict has been declared), and representing personal interests before that board (allowed in the interests of preserving personal rights of boardmembers). This distinction has raised concerns in recent months in part because some City boards include, or are required under the Code to include, professionals in fields related to that board's functions. There are challenges posed by a bar on appearing in front of that board by boardmembers, particularly those who are sole practitioners and do not have colleagues who can work on client matters as needed. In these situations, while the boardmember does not participate as a member of the board, there is a question as to the extent to which he or she must avoid any participation as an advocate or representative for an applicant or other party.

In addition to these Charter limitations on Councilmembers with conflicts of interest, Section 2-568(c)(2) of the Fort Collins Municipal Code provides that "No Councilmember shall represent any person or interest before the City Council or any board or commission of the City."

Application of City Charter Provisions.

1. Sales to the City.

A question underlying this inquiry is the interpretation of Section 9(b)(1)c of Article IV of the Charter (provided above, entitled "Sales to the City") which prohibits an officer or employee from having a financial interest in a sale to the City if he or she exercises "any supervisory authority over the services to be rendered to the city." The Board has considered this question, and has found that the proper interpretation and application of this provision is as referencing supervisory authority exercised on behalf of the City (in a City role), rather than supervisory authority exercised outside of and unrelated to the officer or employee's role for the City. To read this provision otherwise would broadly prohibit any person involved in providing services to the City from participating in City government in any way, regardless of how unrelated that participation may be to that individual's role as a service provider. The language of this provision is ambiguous and susceptible to at least two interpretations. There is no indication in the legislative history of this provision or elsewhere that such a comprehensive effect was intended when this

provision was added to the Charter. The Board recommends that the Council propose to the voters a clarifying change to the Charter that would avoid future uncertainty related to this provision.

2. “As an Officer or Employee.”

A Council-adopted “Policy Statement on Ethics,” in place from 1988 until it was superseded by the adoption of the conflicts provisions in the Charter in 1989, prohibited boardmembers from acting in a representative capacity for compensation to influence a decision of his or her board.

In contrast, the relevant Charter language, adopted by the voters in March 1989, prohibits a boardmember with a conflict of interest in a board decision from “attempting to influence, or otherwise participating in such decision in any manner as an officer or employee.” (City Charter Article IV, Section 9(b)(3) (*emphasis added*)). This prohibition extends to attempting to influence or participating in decisions of boards and commissions that make recommendations to the board that an individual serves on.

This Charter provision has been specifically addressed in three Ethics Opinions:

- Ethics Opinion 91-2 distinguished between boardmembers addressing their own personal interests and boardmembers representing the interests of others:

The Board believes that members of City boards or commissions, as non-elected citizen volunteers, should not be required to give up the right to protect their personal interests when they might be directly affected by a board or commission, even if they serve on that board or commission. This right should not extend, however, to representing interests other than their own individual interests. For example, while a member of the Zoning Board of Appeals should be able to argue in favor of a variance for his or her private residence, that same board member should not be permitted to serve in a representative capacity, with or without compensation, and make presentations to the Zoning Board of Appeals on behalf of another person or entity, such as a developer or neighborhood association. (Ethics Opinion 91-2, page 2).

- Ethics Opinion 91-3, citing to Ethics Opinion 91-2, indicated that the limits on a Councilmember’s participation did not extend to that Councilmember’s spouse, so long as the Councilmember declared a conflict of interest and did not participate in any way in the subject Planning and Zoning Board decision. (Ethics Opinion 91-3, page 4).

- Ethics Opinion 98-1, which was approved by the City Council in Resolution 98-53,³ addressed the question of personal appearances by a boardmember on behalf of a client where the boardmember had declared a conflict of interest and was not participating as a member of the board. That opinion, also citing to Ethics Opinion 91-2, concluded that such appearances before one's own board in a representative capacity would not be allowed, but did not address whether other means of advocating to the board, or providing other materials for consideration by the board, on behalf of a client would also be prohibited. (Ethics Opinion 98-1, pages 3-4).

After a thoughtful review of these prior ethics opinions, the Board has carefully considered the language of the Charter, and is concerned that applying the Charter language to activities not carried out by an individual in his or her role "as an officer or employee" goes beyond the intended meaning and proper interpretation of the language of the Charter. (Please note that different considerations apply to the activities of Councilmembers, in contrast to boardmembers, as described below.)

The Board recognizes there is a need to carefully govern both the involvement of boardmembers where they have declared a conflict, and to avoid any appearance of impropriety that might result from boardmember advocacy to said member's own board. However, the Board believes it would be more appropriate for the Council to adopt City Code provisions establishing and clarifying the extent to which boardmembers may participate in a matter once a conflict has been identified, rather than rely on a broad reading of the Charter provision. The Board also recommends an exception or variance process that allows certain participation in circumstances of hardship or other special circumstances, provided that the decision making board could continue to carry out its decision making role properly.

23. "Attempting to Influence."

In addition, the Board has considered the question of what constitutes "attempting to influence" a decision. The Board concluded that participating in discussion of a particular matter as a boardmember is ~~likely difficult to distinguish~~ indistinguishable from "attempting to influence," and ~~should be avoided~~ is prohibited by the Charter.

Many board decisions of significance are quasi-judicial matters that do not allow for ex parte communications or discussion with stakeholders outside of the hearing process. In those circumstances, the potential for confusion regarding the role in which an individual is acting is very limited.

³ In July 1993, the City Council adopted Ordinance No. 064, 1993, which changed the process for adoption of ethics opinions so as to require Council review and approval.

The Board believes guidelines are needed to set out the limits on and types of interactions that are permissible where a conflict of interest is present. For example the guidelines could:

- Expressly allow boardmembers to be involved (in a representative or personal capacity; not as a boardmember) in matters that come before their board for decision.
 - When participating in a personal capacity, the type of communication would not be limited.
 - When participating in a representative capacity, permissible involvement would include preparation of materials, plans, studies and designs, that are prepared in the normal course of development of the project and that may be presented to and considered by that board but are not made for the primary purpose of communicating with or advocating to the board or a board that will make a recommendation to the boardmember's board on a matter related to the boardmember's work);
- Prohibit boardmembers from appearing or communicating directly with their board in a representative capacity regarding a decision in which they have a conflict, except when a variance has been granted because special hardship or other special circumstances create unfairness for the boardmember or other persons;
- Establish a variance process by which the Council may consider on a case-by-case basis and grant variances that would permit participation in the form of direct communications, presentations, and advocacy, in the event a boardmember has an unusual hardship or other special circumstance (such as illness or incapacity of a professional firm colleague, or unavailability of others as a result of sole proprietorship);
- Address whether limitations should be imposed regarding a boardmember's participation in and communications with boards or commissions that make recommendations to the board the boardmember serves on;
- Clarify that although a boardmember may have a conflict of interest because his or her firm is actively working on a project, this means that the firm is not disqualified from the project so long as the boardmember recuses himself or herself as a boardmember; and
- Establish a disclosure process for a boardmember to use when the boardmember must appear before his or her board to protect a personal interest.

| 34. Councilmember Appearances.

As noted above, express Code language governs concerning the second question (may a Councilmember appear before Council, after declaring and disclosing a conflict of interest, and

participate on behalf of an interested stakeholder if they do not personally appear before Council to advocate on behalf of another person).

Section 2-568(c)(2) of the Fort Collins Municipal Code provides that “No Councilmember shall represent any person or interest before the City Council or any board or commission of the City.” In addition, Colorado statute requires that members of local government governing bodies abstain from any matter in either a personal or an official capacity in the event of a conflict in order to avoid a breach of fiduciary duty and public trust. (Section 24-18-109(3)(a), C.R.S.).

In light of these provisions, the Board agrees it is appropriate to hold Councilmembers to a higher standard and limit more strictly Councilmember participation in any decision in which that Councilmember has a conflict of interest. Nevertheless, in extreme circumstances this may preclude a Councilmember from personally defending his or her own personal interests.

The Board also agreed that although a Councilmember may have a conflict of interest because his or her firm is actively working on a project, the firm is not disqualified from the project so long as the Councilmember recuses himself or herself from the matter. This is because the codified prohibition is on the Councilmember’s personal representation (as opposed to a relative or colleague’s representation) of any person or interest.

Board Conclusions and Recommendations:

1. The language of Article IV, Section 9(b)(1)c is most reasonably interpreted to prohibit an officer or employee from exercising supervisory authority on behalf of the City (in a City role) over services to the City, as opposed to exercising supervisory authority outside of and unrelated to the officer or employee’s role for the City. To resolve this ambiguity otherwise results in an unreasonably broad prohibition on participation in City government. The Board recommends that the Council propose to the voters a clarifying change to the Charter to avoid future uncertainty related to this provision.
2. The language of Article IV, Section 9(b)(3) of the City Charter is most reasonably interpreted to limit the actions of a City officer or employee only in his or her capacity as an officer or employee, and not outside of that role.
23. The Council should adopt City Code provisions to establish and clarify what actions boardmembers are allowed to take, in a representative capacity and in a personal capacity (outside of the boardmember role) in connection with matters in which they have a conflict of interest, as described in Section 2 on pages 5 and 6, above. The Board recommends adoption of a variance process through which the Council may on a case-by-case basis allow boardmembers to actively participate through direct communications, presentations, and advocacy in a matter (as a

representative or a stakeholder) when hardships or other special circumstances create unfairness for the boardmember or other persons.

~~34.~~ The restriction on Councilmember representation of any persons or interests before the Council or a City board or commission should remain in place, although it may be beneficial to clarify this language to distinguish between representation where a Councilmember has a financial or personal interest (as defined in the Charter), ~~and representation in the sense of advocating for certain policy or other interests in the role as a Councilmember.~~ The Board interprets However, this prohibition ~~to does not~~ extend only to a Councilmember personally, and not to the Councilmember's firm or relatives, consistent with prior Ethics Opinions.

~~45.~~ If this Opinion is adopted by the City Council, to the extent this Opinion conflicts with prior Ethics Opinions of the Ethics Review Board, such prior Opinions shall be superseded.

6. If this Opinion is adopted by the City Council, the Board intends to consider proposed City Code revisions to address recommendations 3 and 4, above, and to recommend specific Code revisions upon completion of that review.

This advisory opinion was reviewed and approved by Councilmembers Ray Martinez, Gino Campana, and Kristin Stephens, as the designated regular members of the Ethics Review Board. Under Section 2-569(e) of the City Code, this opinion and recommendation is to be immediately filed with the City Clerk and made available for public inspection. This opinion will be considered by the City Council at its adjourned meeting on July 26, 2016.

Dated this 25th day of July, 2016.

Carrie M. Daggett, City Attorney