

RESOLUTION 96-8
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING THE ADVISORY OPINION AND RECOMMENDATION
NO. 96-1 OF THE ETHICS REVIEW BOARD

WHEREAS, the City Council has established an Ethics Review Board ("the Board") consisting of three 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 Board met on January 16, 1996, to consider whether Councilmember Bob McCluskey has a conflict of interest in participating in the City Council's discussions and decisions regarding a proposed use tax rebate program for to manufacturing companies in the City; and

WHEREAS, the Board has issued Opinion No. 96-1 with regard to the foregoing issue; 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 and recommendation 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. 96-1 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 and recommendation contained therein.

Passed and adopted at an adjourned meeting of the Council of the City of Fort Collins held this 23rd day of January, A.D. 1996.

Mayor

ATTEST:

City Clerk

Failed to
Pass

96-1
OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS

January 16, 1996

The Ethics Review Board ("the Board") met on the above-referenced date to address an inquiry presented by Councilmember Bob McCluskey. In attendance were Ethics Review Board members Mayor Ann Azari, Mayor Pro Tem Gina Janett and Councilmember Will Smith; Councilmember McCluskey; and Councilmember Kneeland, who had presented a separate inquiry to the Board. The question presented by Councilmember McCluskey is whether his ownership interest in Poudre Valley Creamery creates a conflict of interest for him in participating in discussions of the City Council pertaining to a proposed use tax relief program that would apply to Poudre Valley Creamery.

The Proposed Use Tax Relief Program

The City Manager has proposed an interim policy, pending further study of the matter, through which manufacturers that have been in operation in Fort Collins for three years or more may be relieved of some measure of the use tax burden upon their purchases of manufacturing equipment from outside of the city. The recommended approach would provide an effective use tax reduction for affected manufacturers from 3% to 1% on the first \$5 million of the manufacturing equipment purchased, and from 3% to 2% on the next \$10 million of the manufacturing equipment. Equipment purchases of beyond \$15 million would be subject to the current rate of 3% up to a maximum total of \$50 million worth of manufacturing equipment purchases that would be subject to the use tax. Thus, the emphasis of the program would be the reduction of the tax burden on smaller purchases of manufacturing equipment, with a cap on total use tax that would benefit manufacturers making extremely large purchases of manufacturing equipment.

Legal Standards

The Charter recognizes two kinds of interests which can give rise to a conflict of interest for a Councilmember: a financial interest and a personal interest. A financial interest is defined as "any interest equated with money or its equivalent." A financial interest is specifically not to include:

The interest of an employee of a business, or a holder of an ownership interest in such business, in a decision of any public body, when the decision financially benefits or otherwise affects such business *but entails no foreseeable measurable financial benefit to the employee or interest holder.* . . .(City Charter, Article IV, Section 9., emphasis added.)

The Charter defines a personal interest as:

Any interest (other than a financial interest) arising from blood or marriage relationships or from close business, political or personal associations or concerns which would, in the judgment of a reasonably prudent person, tend to impair independence of judgment or action in the performance of official discretionary duties. (City Charter, Article IV, Section 9.)

Analysis of the McCluskey Inquiry

Poudre Valley Creamery ("the Company") is one of approximately 41 manufacturing companies that could be affected by the proposed tax relief program. Councilmember McCluskey is the president of the Company; he is also one of the owners of the Company and, as such, he is a major shareholder and his compensation is partially based upon the profitability of the Company. However, Councilmember McCluskey has informed the Board that his plan of compensation is not based upon any established mathematical formula. Consequently, minor fluctuations in the profitability of the Company from year to year would not generally be reflected by any corresponding change in the amount of Councilmember McCluskey's annual compensation.

Turning first to the financial interest standard, the question presented is whether the proposed program would not only benefit the Company but whether it would, in turn, result in any "foreseeable, measurable financial benefit" to Councilmember McCluskey as an employee or interest holder in the Company. Based upon the information provided by Councilmember McCluskey, the Board does not believe that the proposed use tax program would result in any measurable financial benefit to Councilmember McCluskey. The Company has historically made only very moderate purchases of manufacturing equipment. In fact, during the past five-year period, Councilmember McCluskey has indicated that a use tax rebate of 2% (as proposed by the City Manager) would have resulted in a savings to the Company of approximately \$30 per month. Given the nature of Councilmember McCluskey's financial arrangement with the Company, it does not appear that that level of savings would have resulted in any foreseeable, measurable financial benefit to Councilmember McCluskey as an owner of the Company. Therefore, no *financial* conflict of interest exists.

The next question to be considered is whether a *personal* conflict of interest exists. Councilmember McCluskey clearly has a close association with the Company, as president and owner of the Company. Also, the decision in question is one that is more "focused" on the Company than a decision that, for example, affects all of the City's taxpayers. However, the Board believes that the overriding consideration in this case is the minimal financial impact that the Council's decision would have on the Company. The Board does not believe that a reasonably prudent person would consider that level of potential financial impact as a consideration that would interfere with Councilmember McCluskey's independence of judgment in participating in the Council's deliberations and decisions regarding this matter. On the contrary, Councilmembers

Ethics Opinion 96-1
January 16, 1996
Page 3

are routinely called upon to make policy decisions that could have financial impacts of similar magnitude on each of them, in either their personal or business capacities. Consequently, the Board believes that Councilmember McCluskey does not have a conflict of interest in this matter.

This advisory opinion was reviewed and approved by Mayor Azari and Councilmember Smith, regular members of the Ethics Review Board, with Mayor Pro Tem Janett dissenting from the majority opinion of the Board. Pursuant to 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. Additionally, this opinion shall be considered by the City Council at its meeting on January 23, 1996.

Dated this 16th day of January, 1996.



Stephen J. Roy, City Attorney

SJR:meg