

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 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 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 Chair 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.

Councilmember 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. Ms. 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 boardmembers 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. Mr. Campana commented that this has been under review recently. Mr. Campana was phoned by several members of the Landmark Preservation Commission who have 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. Mr. Campana stated this presents a problem for the City where experts are needed on a board. Mr. Campana stated the question, why are we interpreting the limitation differently now as opposed to the last 20 years? Councilman 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 P&Z 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. Mr. 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. Mr. Campana stated "influencing a decision" in the official capacity of that Board member seems to be a differentiating sentence that lays out the intention. Mr. Campana stated he agreed with Ms. 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? Mr. 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. Mr. Campana believes the City took a conservative approach previously to eliminate any gray area. Mr. Campana stated it was clear to him that if you recuse yourself, you are eliminating yourself from that official capacity on that board.

Councilmember Martinez asked, if you recuse yourself, can you actually participate as an expert? Mr. 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. Ms. Daggett stated the prior Opinions indicate that you could come 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, Ms. Daggett stated they basically say if you are appearing, for example, before P&Z 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. Mr. Campana stated one cannot present to the Board as a professional. Mr. 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 the Charter provision.

Councilmember Campana called attention to two things: 1) the language states that you cannot participate in 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. Mr. Campana stated this has happened historically a couple times with special permission. He fears interpretation presented

today does not even allow that. Mr. Campana stated he wanted to go back to the Charter provision, figure out intent and interpretation. Mr. Campana believed the Charter was attempting to be conservative where it stated one could not participate in the decision, as opposed to the hearing.

Councilmember 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.

Councilmember 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. Ms. 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. Ms. 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. Mr. Campana stated the issue we are having is to make more clear for boards and commissions how this applies to them and what they can do, in order to avoid panic or unnecessary resignations. Mr. 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. Ms.

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.

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. "Participating in discussion" probably is "attempting to influence." It is hard to not attempt to influence and still be part of the discussion. Focus should be on the capacity of the person and what role they are in. If one is in the audience participating on behalf with an applicant, then one is participating on behalf of the applicant, and not participating as an officer/employee. There is interest in seeing follow-up on discussion by Council of more narrow limitation than are in the Charter and what Council would want to institute in Code to discourage and create limitations on boardmember activities, including a potential for a variance or some other special process for boardmembers who are seeking to participate in a process in front of their own board in a representational capacity. Ms. 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 not to make a distinction. Mr. Campana then asked Ms. Daggett if she felt there is a distinction.

City Attorney Daggett stated there is some state law on Councilmembers being held to a stricter standard.

The Board members stated they were okay with that approach. It was further discussed that state law might raise the question for Council members to be held to a stricter standard when presenting to Council. Councilmembers Campana and Stephens agreed. Councilmember

Martinez asked for clarity on the state law and how the idea of representing an interest would be interpreted.

City Attorney Daggett that there is some room for distinctions to be made in applying that term. There is a difference, for example, if an architect drawing 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 Ms. 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 with Board Members on what City Attorney Daggett described.

Councilmember 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