

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.

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.

3. "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 indistinguishable from "attempting to influence," and 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.

4. 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.
3. 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.

4. 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). The Board interprets However, this prohibition to extend only to a Councilmember personally, and not to the Councilmember's firm or relatives, consistent with prior Ethics Opinions.

5. 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