

RESOLUTION 2014-120
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING ADVISORY OPINION AND RECOMMENDATION NO. 2014-2
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 December 4, 2014, to consider whether Mayor Karen Weitkunat whether and the extent to which Opinion No. 2012-2 of the Board, dated October 31, 2012, which concluded that she has a personal interest in decisions of the City Council regarding the redevelopment of Foothills Mall, now precludes her from participating generally in matters related to Foothills Mall; and

WHEREAS, the Board has issued an advisory opinion with regard to this matter concluding that the mere fact that a decision is associated in some way with Foothills Mall should not be construed as conclusive on the question of whether the Mayor has a conflict of interest in relation to that decision, and that specific questions of whether Mayor Weitkunat has a conflict of interest with respect to matters associated with Foothills Mall should be determined on a case-by-case basis; and

WHEREAS, Opinion No. 2014-2 is not intended to constitute, or be interpreted as, a re-evaluation, reaffirmation, or overturning of Opinion No. 2012-2; 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 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. 2014-2 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 a regular meeting of the Council of the City of Fort Collins this 16th day of December, A.D. 2014.



Mayor Pro Tem

ATTEST:



City Clerk



2014 -2
**OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS**

December 4, 2014

The City Council Ethics Review Board ("the Board") met on December 4, 2014, to render an advisory opinion on a question submitted to the Board by Mayor Karen Weitkunat under Section 2-569(c)(2) of the City Code. Mayor Weitkunat has asked the Board to consider whether and the extent to which Opinion No. 2012-2 of the Board, dated October 31, 2012, which concluded that she has a personal interest in decisions of the City Council regarding the redevelopment of Foothills Mall, now precludes her from participating generally in matters related to Foothills Mall. Opinion No. 2012-2 (a copy of which is attached as Exhibit "A") concluded that the Mayor had a conflict in City Council decisions related to the redevelopment of Foothills Mall, in view of the fact that the Mayor's residence is located in close proximity to the Mall, and further concluded that the Mayor did not have a conflict of interest with regard to Urban Renewal Authority Board ("URA") decisions related to Foothills Mall redevelopment, in light of the different standards applicable to the URA.

Factual Summary.

In October 2012, when the Board met to consider whether the Mayor had a conflict of interest in participating in decisions of either the City Council or of the URA with regard to the possible redevelopment of the Foothills Mall (the "Mall"), no formal application had yet been submitted to the City with regard to the possible redevelopment of the Mall. However, at that time it was anticipated that proposals related to the redevelopment would be presented for their consideration in the near future. The decisions of the City Council and the Urban Renewal Authority (URA) identified at that time included:

- Financial incentive proposals;
- Decisions related to the Foothills Mall Metropolitan District Amended Service Plan and related intergovernmental agreement regarding the operation and maintenance of public facilities;
- Decisions related to the Youth Activity Center lease, which the City currently operates in a building on the Mall property; and
- The potential appeal, if any, of the Planning and Zoning Board's decisions related to the Mall.

The Mayor's residence is located approximately 350 feet from the Mall redevelopment site, on the other side of Swallow Road. The majority of the Board at that time held the opinion that the Mayor had a personal interest in Council decisions related to the Mall redevelopment, primarily because it appeared likely, based upon the information provided by City staff, that the redevelopment of the Mall will, at least over time, significantly increase the value of the Mayor's residence, especially in view of the blighted conditions that presently exist at the Mall.

Conversely, if the Mall redevelopment negatively impacts nearby properties in terms of traffic, lighting, noise and views, these impacts would be different in kind from those experienced by the rest of the community. There was a dissenting view based on disagreement with these conclusions.

The Council actions noted above have generally been completed, and other circumstances related to the Mall redevelopment have evolved. During 2014, the redevelopment of the Mall moved forward, and the actions of the City and the URA regarding the redevelopment generally were completed. Matters related to Foothills Mall continue to come before the City Council and URA, but generally relate to specific actions and issues, rather than to the broader question of what level of financial support the City and/or URA will provide to the redevelopment project, and have a less direct impact on whether the Mall redevelopment project will continue to move forward. The Redevelopment and Reimbursement Agreement between the City, URA, Foothills Metropolitan District ("District") and the Mall developer, which outlines the financial relationship between those entities in support of the redevelopment, has been fully signed and is being implemented. The key financial aspect of that agreement, the issuance of bonds by the District for which URA tax increment revenues have been pledged by the URA, has been accomplished.

Application of City Charter Provisions.

The determination of conflicts of interest questions is governed by the City's local conflict of interest provisions, as contained in Art. IV, Sec. 9 of the City Charter (the "Charter"). These provisions require that any Councilmember who has a financial or personal interest in a decision of the Council disclose such interest and refrain from voting on, attempting to influence, or otherwise participating in such decision in any manner as a Councilmember. Under the Charter, a "financial interest" is defined under the Charter as "any interest equated with money or its equivalent." Opinion No. 2012-2 concluded that the Mayor did not have a "financial interest" in the redevelopment of the Mall, and there has been no request or need for further discussion or analysis of that issue.

Opinion No. 2012-2 concluded that the Mayor has a "personal interest" in decisions related to the redevelopment of the Mall under the Charter. The Charter defines a personal interest in relevant part as an interest by reason of which a Councilmember would, in the judgment of a reasonably prudent person, realize or experience some "direct and substantial benefit or detriment different in kind from that experienced by the general public." This benefit or detriment need not be financial in nature, but it must be "direct and substantial." As established by the City Council in Ordinance No. 145, 2014:

- *Different in kind from that experienced by the general public* means of a different type or nature not shared by the public generally and that is not merely different in degree from that experienced by the public generally.
- *Direct* means resulting immediately and proximately from the circumstances and not from an intervening cause; and

- *Substantial* means more than nominal in value, degree, amount or extent.

In considering whether the Mayor generally now has a personal interest in redevelopment of the Mall, the Board declined to re-evaluate, reaffirm or overturn Opinion No. 2012-2. Rather, the Board reviewed the Opinion in order to evaluate its continuing application to matters arising in connection with the Mall or other projects related to the Mall. In light of the specific basis for the 2012 finding that the Mayor had a personal interest, it is unclear whether different types of matters or different circumstances similarly raise a personal interest (or a financial interest). Without a full understanding of the specific circumstances and scope of the issues presented, it is not possible to make a meaningful determination of whether a conflict exists. As a result, the Board unanimously concluded that any future decisions to come before the Council related to Foothills Mall should be evaluated based on the relevant circumstances and issues presented at the time, and that Opinion No. 2012-2 should not be read to control the analysis of individual matters as they arise in relation to the Foothills Mall.

Summary and Conclusion.

In summary, the Board has concluded that questions of whether Mayor Weitkunat has a conflict of interest in participating in future decisions of the City Council should be evaluated and determined independently based on the applicable circumstances and considerations at the time those questions arise. The mere fact that a decision is associated in some way with Foothills Mall should not be construed as conclusive on the question of whether the Mayor has a conflict of interest in relation to that decision. However, the Board does not intend for this Opinion to constitute, or be interpreted as, a re-evaluation, reaffirmation, or overturning of Opinion No. 2012-2.

This advisory opinion was reviewed and approved by Councilmember Poppaw and Councilmember Gino Campana, as regular members of the Ethics Review Board, and Councilmember Ross Cunniff, the alternate member of the Board. Councilmember Cunniff participated in the deliberations and decision of the Board because as the subject of the inquiry Mayor Weitkunat did not participate. 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 regular meeting on December 16, 2014.

Dated this 4th day of December, 2014.

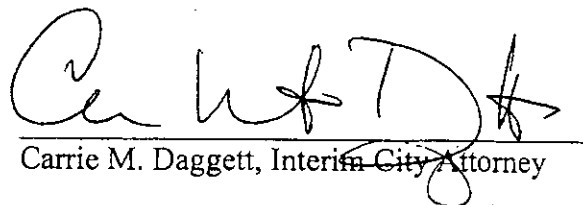

Carrie M. Daggett, Interim City Attorney

EXHIBIT "A"

OPINION No. 2012-2 OF THE ETHICS REVIEW BOARD OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS

October 31, 2012

Background.

This advisory opinion and recommendation is being provided to the City Council by the Ethics Review Board (the "Board") under Section 2-569(e) of the City Code in response to an inquiry submitted to the Board by Mayor Karen Weitkunat. The question submitted is whether the Mayor has a conflict of interest in participating in decisions of either the City Council or of the Fort Collins Urban Renewal Authority (the "URA") with regard to the possible redevelopment of the Foothills Mall (the "Mall"), in view of the fact that the Mayor's residence is located in close proximity to the Mall.

Summary of Opinion and Recommendation.

The majority of the Board believes that, in the judgment of a reasonably prudent person, the Mayor may realize or experience some direct and substantial benefit or detriment from the redevelopment of the Mall because of the proximity of her residence to the site of the redevelopment, and that this benefit or detriment would be different in kind, and not just in degree, from that experienced by the general public. Therefore, the Board recommends that the Mayor declare a conflict of interest with regard to any decisions of the City Council related to the Mall redevelopment.

The Board does not believe that a conflict of interest exists with regard to decisions that the Mayor may make with regard to the Mall redevelopment as a member of the URA Board of Directors. That is because the conflict of interest standards applicable to URA Board members are different than the City Charter standards that are applicable to decisions of the City Council, and the Mayor clearly does not have the kind of financial interest in the Mall redevelopment project that would disqualify her from participating in URA decisions related to the project.

The Information Presented to the Review Board.

No formal application has yet been submitted to the City with regard to the possible redevelopment of the Mall. However, both the City Council and the URA Board of Directors, which is comprised of the members of the City Council, will likely have proposals related to the redevelopment presented for their consideration in the near future. The decisions of the City Council may include the following:

1. Financial incentive proposals.
2. Decisions related to the Foothills Mall Metropolitan District Amended Service Plan and related intergovernmental agreement regarding the operation and maintenance of public facilities.
3. Decisions related to the Youth Activity Center lease, which the City currently operates in a building on the Mall property.

The Council would also be called upon to hear any appeal of the Planning and Zoning Board's decisions related to the Mall, if such an appeal is filed.

In addition, the URA board will be making decisions related to the Mall, including possible approval of a resolution authorizing an agreement to negotiate with Alberta Development Partners, LLC ("Alberta"), the developer of the Mall, and a resolution authorizing the acquisition of certain property interests by eminent domain actions that would, if approved, make the Mall redevelopment more likely.

Attached to this Opinion as Exhibit "1" is a general description of the work that Alberta intends to undertake during the course of the redevelopment. It appears that the redevelopment will include not only the reconstruction of retail establishments at the Mall but also multi-family residential development, both of which may significantly increase the amount of vehicular traffic in and out of the Mall property.

The Mayor's residence is located approximately 350 feet from the Mall redevelopment site, on the other side of Swallow Road. The "notice zone" within which neighboring property owners will receive written notice of the Mall redevelopment project under Section 2.2.6 of the City's Land Use Code (the "LUC") has been established at 1,000 feet. The reason that notice of a proposed development project is mailed to persons within this zone is to ensure the owners of properties that may be directly affected by the project can express their views to City staff about the project as it is being reviewed by the City, and can also appear before the City's decision makers, including the City Council, to express any concerns they might have.

The Mayor has indicated that she does not anticipate that the redevelopment project will have any significant impact on the value of her residence or the quality of life that she enjoys as a resident of the area. She points out that the Mall and its related traffic impacts already exist, and that the redevelopment proposal is unlikely to affect neighboring properties in the same way or to the same extent that a "greenfield" development proposal might.

To better assess whether the Mall redevelopment may have a direct and substantial impact on the value of properties in close proximity to the Mall, the Board inquired of City staff, who in turn contacted several appraisers and one real estate broker. Staff reported that there was a consensus

among those they interviewed that, at least over the long term (the next ten years), properties close to the Mall will increase in value as a result of the Mall redevelopment. There was also an indication that neighboring properties could experience a negative, rather than positive, impact if the redevelopment significantly impacts traffic flows or views or generates additional noise or lighting. The consensus was that properties closer to the main access areas of the Mall would be more significantly impacted, one way or the other, than those farther away.

Opinion and Recommendations.

The Board considered the information provided by the Mayor and the staff in light of the conflict of interest provisions of the City Charter, which are attached as Exhibit "2." It is clear to the Board that the Mayor does not have a "financial interest" in the upcoming Council decisions about the Mall redevelopment, as that term is defined in the Charter. The closer question is whether she has a "personal interest," that is, whether, in the judgment of a reasonably prudent person, the Mayor "would realize or experience some direct and substantial benefit or detriment different in kind from that experienced by the general public" if she were to participate in City Council decisions that will make the redevelopment of the Mall more or less likely.

In view of the information presented to the Board, the majority of the Board (Councilmembers Manvel and Poppaw) believes that the Mayor does have a conflict of interest under this standard and should not participate in City Council decisions related to the Mall redevelopment. Councilmembers Manvel and Poppaw hold this opinion primarily because it appears likely, based upon the information provided by City staff, that the redevelopment of the Mall will, at least over time, significantly increase the value of the Mayor's residence, especially in view of the blighted conditions that presently exist at the Mall. Conversely, if the Mall redevelopment negatively impacts nearby properties in terms of traffic, lighting, noise and views, these impacts would be different in kind from those experienced by the rest of the community.

The third member of the Board, Councilmember Kottwitz, believes that the Mayor does not have a conflict of interest since there is no clear indication that either the property values or quality of life of persons residing in close proximity to the Mall will be directly and substantially affected by the Mall redevelopment in a way that is different from the general public.

In arriving at its opinion and recommendation, the Board considered previous opinions and recommendations provided by the Board in Opinions No. 1999-8 and 2004-1, including the various factors that the Board has recommended be considered in this kind of situation. The factors that the Board has considered include: the size of the group that will likely be affected in the same way and to the same extent as the Councilmember who is the subject of the inquiry; the magnitude of the potential financial or personal impact that the Councilmember may experience; the need for the Councilmember to participate in the upcoming decision(s) as an elected representative; and how close the connection is between the upcoming decision(s) and the potential impact on the Councilmember. However, the Board disagrees with the

recommendation contained in Opinion 1992-8 that Councilmembers who are faced with any kind of official capacity decision involving public or private property located within 500 feet of their residence should always recuse themselves on the assumption that the proximity of the property, in itself, creates a conflict of interest. Instead, the Board believes that, while such proximity should automatically call for Board review of the situation, each such situation should be considered on a case-by-case basis, applying the factors recited above.

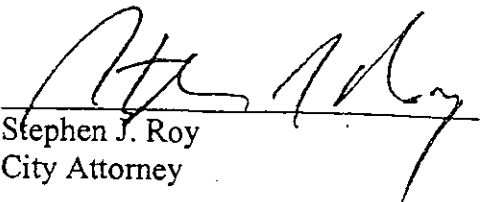
As to the Mayor's ability to participate in URA Board decisions regarding the Mall redevelopment, all three Board members agree that no conflict of interest exists under the state conflict of interest laws that are applicable to the URA Board. The statutory conflict of interest rule that applies specifically to URA Board members is limited to situations in which URA Board members have a financial interest in the projects that they are considering, and the other, more general ethical rules and principles for "local government officials and employees" do not speak to the Mayor's situation. The ethical rule that is contained in the URA statute reads as shown below.

31-25-104(3) No commissioner, other officer, or employee of an authority nor any immediate member of the family of any such commissioner, officer, or employee shall acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, nor shall he have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any project.

Because the Mayor has no interest, direct or indirect, in the Mall redevelopment project, she has no conflict of interest in URA decisions related to the project. However, the Board believes that, because the URA Board consists of the members of the City Council, the same ethical rules should apply to the URA as apply to the City. This change can be accomplished through an amendment to Section 2-483 of the City Code because the City Charter exempts the officers and employees of its authorities from its conflict of interest rules only if the City Code expressly authorizes such an exemption, which it presently does. Therefore, the Board recommends that Section 2-483 be amended so as to eliminate that exemption.

This advisory opinion was reviewed and approved by Councilmembers Ben Manvel, Lisa Poppaw and Aislinn Kottwitz, as regular members of the Ethics Review Board, for distribution to members of the Council and for distribution to the City Clerk, to be maintained in the permanent file of opinions of the Ethics Review Board.

Dated this 31st day of October, 2012


Stephen J. Roy
City Attorney