

RESOLUTION 2012-020
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING THE ADVISORY OPINION AND
RECOMMENDATION NO. 2012-1 OF THE ETHICS REVIEW BOARD

WHEREAS, the City Council has established an Ethics Review Board (the "Board") consisting of three members of City Council; and

WHEREAS, among the responsibilities of the Board is the duty to review and investigate complaints of unethical conduct filed against Councilmembers or board and commission members; and

WHEREAS, a complaint was filed with the City on January 13, 2012 against Gino Campana, a member of the Planning and Zoning Board; and

WHEREAS, the City Council has referred the complaint to the Board under Section 2-569(d)(1)(b) of the City Code for an advisory opinion as to whether the violation alleged in the complaint has occurred and, if so, the action, if any, that should be taken with regard to such violation; and

WHEREAS, at meetings held on February 23 and 27, 2012, the Board has reviewed and investigated the complaint and has concluded that Mr. Campana did not violate the conflict of interest provisions of the City Charter as alleged in the complaint; and

WHEREAS, under Code Section 2-569(e), after investigation, the Board is to forthwith issue an advisory opinion and recommendation to the City Council, which shall be available for public inspection, and which are to be place on the agenda for the next special or regular City Council meeting, at which time the City Council is to determine whether to adopt the same; and

WHEREAS, the Board has issued an advisory opinion and recommendation with regard to the complaint, attached hereto as "Exhibit "A"; and

WHEREAS, the City Council has reviewed said opinion and recommendation and wishes to adopt the same.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Opinion No. 2012-1 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 a regular meeting of the City Council held this 20th day of March, 2012.

Karen Weikenset
Mayor

ATTEST:

Rita Knoll Harris
Interim City Clerk



12-1
**OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS**

February 27, 2012

Background.

On January, 13, 2012, a complaint was filed with the City Clerk's Office by David Bell ("Bell"). A copy of the complaint is attached. The complaint alleges that Gino Campana ("Campana"), a member of the City's Planning and Zoning Board (the "Board"), violated the conflict of interest rules contained in the City Charter by improperly participating in discussions of the Board regarding a proposed change in a particular Land Use Code ("LUC") provision (the "LUC Amendment"). The provision in question is LUC Section 3.4.1(E), the purpose of which is to establish a buffer zone the developed portions of property adjacent to the Poudre River (the "River") and other waterways and the edge of the areas to be protected. Staff recommended the LUC Amendment to clarify the point from which the buffer zone is measured. The complaint is based on the fact that, at the time of such discussions, Campana was negotiating for the purchase of a parcel of real property (the "Bender Property" or the "Property") that could be affected by the LUC Amendment

Under Section 2-569 of the City Code, the complaint was referred to us by the City Council (the "Council") for an opinion and recommendation as to whether the violation alleged in the complaint occurred and, if so, what action, if any, should be taken by the Council with regard to the violation.

Summary of Opinion and Recommendation.

The information presented to us indicates that the Bender Property was among a relatively small group of properties in the City that could be directly affected by the LUC Amendment. Based on that information, however, it does not appear that at the time Campana participated in the Board's discussions regarding the LUC Amendment he would have, in the judgment of a reasonably prudent person, experienced any direct and substantial benefit or detriment as a result of that amendment. Therefore, it is our opinion that Campana did not violate the conflict of interest provisions of the Charter.

On a related note, the information presented to us suggests that there is some confusion among Board members about the application of the Charter's conflict of interest rules to recommendations made by the Board about legislative matters such as the LUC Amendment, as opposed to Board decisions about quasi-judicial matters. To address this concern, we recommend that the City Attorneys' Office provide additional training on that subject to the members of the Planning and Zoning Board and to other City boards that perform both legislative and quasi-judicial functions.

The Information Presented to the Review Board.

Information was presented to us with regard to the complaint at our meetings on February 23 and 27, 2012. Draft minutes of those meetings are attached, together with: (1) a written summary of facts presented to us and to Campana by the City Attorney prior to our meetings; and (2) copies of the written materials presented during the course of the meetings. At the meetings, additional information was presented by and on behalf of Campana, the members of the Board, and City staff. After reviewing that information, we have reached the following conclusions about the facts related to this matter:

- There is a divergence of opinion among professional engineers as to whether the LUC Amendment has helped clarify the way in which the buffer zone between proposed development and waterways in the City should be established.
- The LUC Amendment, as applied to the Bender Property, may or may not result in a change in the size or location of the buffer that will be required of the developer of the Property. It does appear that the adoption of the LUC Amendment will result in a change in the location of the initial 300-foot buffer, as prescribed by the table contained in LUC Section 3.4.1(E). The western end of that buffer will be moved approximately 45 feet further from the River. However, the final size and location of the buffer will be negotiated between City staff and the property owner using certain “performance standards” contained in the LUC.
- The Bender Property is presently located in unincorporated Larimer County but, under an intergovernmental agreement between the City and the County, will need to be annexed to the City before it can be developed.
- In July, 2011, Campana actively participated in discussions of the Board regarding the LUC Amendment, both at a work session held on July 15, 2011, and at a subsequent formal meeting of the Board held on July 21, 2011. He was instrumental in defeating the amendment at the Board meeting. He argued that the revision should be postponed until something more concrete and definable was developed and that the proposed definition would make buffers more restrictive for the land owner, which he considered unfair. However, the LUC Amendment was reconsidered by the Board in October, 2011, at staff’s request and was adopted unanimously without his participation.
- Campana is an active developer of properties in Northern Colorado and is regularly involved in the possible acquisition and development of a large number of properties. On June 9, 2011, Campana entered into a contract to exchange a number of condominiums that he owns for the Bender Property. The contract gave both property owners broad latitude to inspect and evaluate the properties being exchanged and to terminate the contract “if issues were discovered.” As of July 6, 2012, Campana had decided not to pursue the property exchange on the terms and conditions contained in the contract. However, in August, 2011, active negotiations resumed between Campana and the owner

of the Bender Property when the owner reduced his asking price for the Property in response to a counteroffer Campana had made. Campana purchased the Property in September, 2011, and has since submitted a conceptual plan to the City for redevelopment of the Property.

- Campana did not participate in any discussions of the Board regarding the LUC Amendment after the July work session and July meeting of the Board.
- Campana first learned of the 45-foot difference in the basic buffer requirement for the Property during the course of our meeting on February 23, 2012.

Analysis of the Issue Presented.

The conflict of interest provisions of the City Charter are attached. The question of whether Campana had a conflict of interest that required him to recuse himself from the Board's consideration of the LUC Amendment and file a conflict of interest disclosure statement with the City Clerk hinges upon whether Campana had either a financial or personal interest in the approval or rejection of the LUC Amendment.

We do not believe that Campana had a financial interest in the matter because there is no indication that the Council's decision about the LUC standard would have resulted in any immediate financial return to Campana. Whether he had a personal interest in the decision is a closer question. The definition to be applied in making that determination reads as follows:

“Personal interest means any interest...by reason of which an officer or employee...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.”

Because there are several components to this definition, we have considered each one separately.

First, in determining how the “reasonably prudent person” would judge the situation, we have applied that standard to the facts as they were known to Campana at the time of the July work session and Board meeting. Campana knew at that time that he was engaged in negotiations to acquire the Bender Property, and that the Property was differently situated in relation to the application of the LUC provision in question than the vast majority of properties in the City. The LUC Amendment applied only to properties that are located next to waterways, as is the Bender Property. As previous Ethics Review Boards have noted in earlier opinions, the size of the affected group of which an officer or employee is a member determines whether that person's interest is different in kind from that of the general public. We believe that Campana's interest in the LUC Amendment was different in kind (and not merely in degree) from that shared by the general public.

Next, we looked at whether a reasonably prudent person would believe that Campana would experience a *direct and substantial* benefit or detriment as a result of the adoption or rejection of the LUC Amendment. It is our opinion that a reasonably prudent person knowing all the relevant facts would not believe that to be true.

With regard to how directly the decision on the LUC Amendment might affect Campana, we consider it significant that, at the time of his participation in the Board's discussions of the amendment, it appeared unlikely that he would be successful in acquiring the Bender Property. Moreover, the effect on the Bender Property was uncertain because the Property was—and still is—located in the County. As such, it is not immediately subject to the proposed new buffer standard. We recognize that, under the City's intergovernmental agreement with the County, the owner of the Bender Property will need to petition for annexation to the City before developing the Property. However, the timing and that annexation petition is uncertain and the outcome is not guaranteed since all annexation decisions are discretionary with the Council. In addition, it was unclear and remains unclear whether the LUC Amendment will actually have any effect on the size and location of buffer on the Bender Property. At the time of the July work session and Board meeting, no measurements had been done to see what effect the new definitions would have on the location of the 300-foot buffer and, perhaps more importantly, the buffer standards are often not applied in a rigid way because, under LUC Section 3.4.1(E), the buffer must be increased or decreased to meet certain performance standards in order to ensure that it serves its intended purpose. For these reasons, it is the Board's opinion that a reasonably prudent person would not consider the link between the LUC Amendment and Campana's financial interests to be a direct one. A number of variables would have to fall into place in order for that direct connection to exist.

The next question is whether the effect of the LUC Amendment on the Bender Property—and on Campana's overall financial interests—would be "substantial." We believe that this standard should be applied objectively. In other words, whether a City decision will make a "substantial" difference to an officer or employee should be judged in terms of the potential effect of the decision on the average person, rather than on the particular officer or employee. Otherwise, a very wealthy officer or employee would be free to participate in decisions that an officer or employee of more modest means could not. Such a result would very likely undermine the public's confidence in the integrity of the government.

Applying the "substantiality" standard objectively, we believe it is unclear whether the LUC Amendment will have a substantial effect on the way in which the Bender Property can be developed or on the overall profitability of the development. That is because, as mentioned above, the buffer zone for the Property may not change as a result of the Council's adoption of the LUC Amendment. The standard 300-foot buffer will be subject to the same possibility of modification under the LUC Amendment as it was under the previous LUC standard. Therefore, at the time that Campana participated in the Board's consideration of the LUC Amendment, we do not believe that a reasonably prudent person knowing all the relevant facts would have thought he had anything substantial to gain or lose as a result of Council's decision on the amendment.

Board Members' Uncertainty about the Applicability of the Conflict of Interest Rules.

It is clear from the information provided to us that there is some confusion among Planning and Zoning Board members as to the extent to which the Charter's conflict of interest rules apply to recommendations made by the Board to the City Council with regard to policy matters such as the LUC Amendment. In carrying out its duties under the City Code, the Board deals with two kinds of matters: decisions regarding specific development proposals, and recommendations to the Council regarding proposed LUC changes or other policy matters. Information provided to us by several current and past members of the Board suggests that, while they are very cognizant of the impartiality rules that apply to decisions they make about specific development proposals when acting in a quasi-judicial capacity, they are less certain about the way in which the Charter's conflict of interest rules should be interpreted and applied to recommendations they are called upon to make with regard to policy matters.

Opinion and Recommendation.

For the reasons stated above, it is our opinion that Campana did not have a conflict of interest that prevented him from participating in the Board's discussions and recommendations regarding the LUC Amendment. Nonetheless, we believe that it was entirely appropriate for this matter to have been brought to the attention of the City by Mr. Bell, since the many factors reducing the probability of this decision having a direct and substantial financial impact on Mr. Campana become clear only after careful examination of the situation. It is critical that the officers and employees of the City remain vigilant in trying to ensure that their participation in the City's decision making processes is motivated solely by an interest in the public good and not by an interest in personal gain.

Because of the input we received from members of the Board, we recommend that, to the extent reasonably possible, the City Attorney's Office and City staff supplement the training that is currently provided to City board and commission members to further clarify the application of the conflicts of interest requirements to both quasi-judicial and legislative matters. It is important that all board and commission members understand the conflict of interest rules that are applicable to their service with the City and recognize when those rules might require their recusal. In particular, we further recommend that a representative of the City Attorney's Office meet with the members of the Planning and Zoning Board in the near future to review the ethical rules applicable to Board members' participation in both quasi-judicial decisions and in the recommendations that the Board makes to the Council regarding policy matters. We also recommend that the City Attorney's Office provide similar clarification to other City boards that perform both quasi-judicial and legislative functions.