

RESOLUTION 95-91
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING THE ADVISORY OPINION AND RECOMMENDATION
NO. 95-6 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 June 14, 1995, to consider whether Councilmembers Gena Janett, Will Smith and Chuck Wanner have a conflict of interest in participating in the City Council's decision regarding the Eastside and Westside Neighborhood Guidelines; and

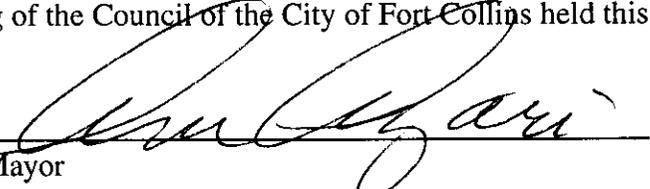
WHEREAS, the Board has issued Opinion No. 95-6 with regard to the foregoing issue; and

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. 95-6 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 Council of the City of Fort Collins held this 20th day of June, A.D., 1995.



Mayor

ATTEST:



Deputy City Clerk

95-6
**OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS**

June 14, 1995

The Ethics Review Board ("the Board") met on the above-referenced date pursuant to the provisions of Section 2-569 of the City Code to consider a question presented by Councilmember Chuck Wanner. Also affected by Councilmember Wanner's inquiry are Mayor Pro Tem Gina Janett and Councilmember Will Smith. The question presented is whether these Councilmember(s)' residency or ownership of property in the area to be governed by the proposed Eastside and Westside Neighborhood Guidelines ("the Guidelines) creates a conflict of interest which would prevent them from participating in the Council's review of the Guidelines.

BACKGROUND INFORMATION:

The Guidelines have been developed to help ensure that the renovation of existing structures, as well as new construction, in the older core commercial and residential areas of the City maintain the character and uniqueness of these areas. The recommendations contained in the Guidelines also identify three potential historic/landmark districts which, if designated, would be subject to additional regulation by the City.

Councilmember Wanner resides in one of the proposed historic districts, Councilmember Smith intends to purchase a rental property in one of those districts and Councilmember Janett resides in the Eastside neighborhood. It is estimated that there are approximately 3,000 residences in the City which will be affected by the Guidelines, approximately 1,300 of which are situated in the three proposed historic districts. Councilmembers Wanner and Janett were elected from districts which will be affected by the Guidelines. Councilmember Smith's district is not within that area.

RELEVANT CHARTER PROVISIONS:

As you know, the City Charter defines two kinds of interests which can create a conflict of interest: financial and personal. These are defined as follows:

Personal interest means 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.

Financial interest means any interest equated with money or its equivalent.

ISSUES PRESENTED:

It is possible that the ownership of property within an area affected by proposed zoning regulations (or residency within that area) can create either a financial or personal interest on the part of a Councilmember. In the past, the Ethics Review Board has rendered two advisory opinions on this subject. Copies of those opinions are attached.

In Opinion 92-6, the Board concluded that Councilmember Dave Edwards had a personal conflict of interest in participating in Council deliberations regarding amendments to a zoning ordinance that modified the zoning district boundaries in the 400 block of West Mountain Avenue/Oak Street vicinity. This was because Councilmember Edwards owned certain real property at 402 West Mountain Avenue, and the properties affected by the rezoning were in close geographic proximity to the Edwards property. Moreover, the Board believed that the rezoning created a "close" business concern for Mr. Edwards because it affected the suitability of the neighboring properties for rental purposes, and the availability of additional rental properties in the area might have affected Mr. Edwards' own property. In that Opinion, the Board concluded that Councilmember Edwards did not have a conflict of interest in participating in Council decision-making regarding the Westside Neighborhood Plan and the zoning of the Westside neighborhood, because those decisions affected a larger geographic area and the overall rezoning did not have the same potential impact on the Edwards property.

Similarly, in Opinion 93-3, the Board rendered an opinion that Councilmember McCluskey would not have a conflict of interest in participating in Council deliberations regarding the establishment of storm drainage utility fees that would affect property owned by Councilmember McCluskey in the storm drainage basin in question. The Board reasoned that Councilmember McCluskey had the same kind of interest in the establishment of those fees as approximately 4,000 or so other property owners in the basin. The Board did agree with Councilmember McCluskey's conclusion that he should not participate in the City Council's decision whether to adopt the storm drainage plan for the basin, since the plan entailed potential storm drainage improvements immediately adjacent to his property. Here, the Board reasoned that although the monetary impact of the proposed improvements on the McCluskey property was unknown, the group of property owners immediately and directly affected by the proposed improvements was relatively small. Thus, the decision on the Storm Drainage Plan in question focused in part on Councilmember McCluskey's individual interest.

In rendering Opinion 93-3, the Board established certain factors to be considered in determining whether a reasonably prudent person would believe that a Councilmember's interest in a particular decision creates a conflict of interest. Those factors are as follows:

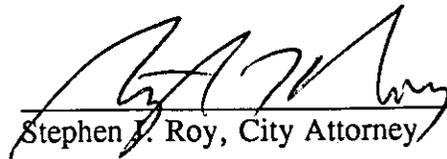
- The extent to which the decision "focuses" on the individual Councilmember;
- The magnitude of the potential financial or personal impact of the decision on the individual Councilmember; and
- The need for the Councilmember to participate in the decision as an elected representative.

In applying these factors, as well as the reasoning of the Board in the other two situations, the Board believes that Mayor Pro Tem Gina Janett and Councilmembers Chuck Wanner and Will Smith do not have a conflict of interest in participating in Council's deliberations regarding the Guidelines. This is primarily because there are thousands of people who are similarly situated in terms of their property ownership and the affect that the Guidelines would have on these properties. Additionally, there is no indication that the adoption of the proposed Guidelines would have a substantial financial or personal impact on the properties owned by the Councilmembers. Finally, two of the Councilmembers are elected representatives of individuals residing in the areas to be affected by the Guidelines and, if those Councilmembers had to declare a conflict of interest in this matter, those persons would be left without a representative voice in Council's decision as to whether their properties should be regulated by the Guidelines.

The Board does believe, however, that if future Council decisions focus more directly on the particular properties owned or occupied by any of the Councilmembers, those Councilmembers should continue to be alert to the possibility of a conflict of interest. For example, if the particular areas in which Councilmembers Wanner and Smith own (or intend to purchase) properties are proposed for actual designation as local landmark districts, then the question of conflict of interest should be revisited and the factors described above applied again to determine the extent to which those properties may be directly affected by such subsequent Council action.

This advisory opinion was reviewed and approved by Ann Azari and Bob McCluskey, members of the Ethics Review 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.

Dated this 17th day of June, 1995.



Stephen J. Roy, City Attorney

OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS

August 11, 1992

The Ethics Review Board ("the Board") met on the above-referenced date at the request of Councilmember Edwards and pursuant to the provisions of Section 2-569 of the City Code to consider the complaint dated August 5, 1992 ("the Complaint") filed by Mr. Joe Bastian with Mayor Pro Tem Ann Azari. The Complaint alleges a conflict of interest on the part of Councilmember Edwards and specifically states as follows:

In September and October, 1991, the City Council considered a variety of ordinances collectively known as the West Side Neighborhood Rezoning. During the October 15, 1991 Council meeting, Councilmember Edwards introduced an amendment to Ordinance No. 113, 1991, that modified the zoning district boundaries in the 400 block in the Mountain Avenue/Oak Street vicinity. Because Councilmember Edwards owns the property at 402 West Mountain Avenue and all 16 properties affected by his amendment are within one and one-half block of his property, I maintain that he had both a personal and financial interest (as defined by the City Charter) in this action. It was therefore impossible for him to perform his duties as a member of the Council in an unbiased and impartial manner.

The question presented to the Ethics Review Board for consideration is whether Councilmember Edwards was possessed of a conflict of interest with regard to the above-referenced matter sufficient to prohibit him from voting, attempting to influence or otherwise participating in the rezoning decision which is the subject of the Complaint.

APPLICABLE CHARTER PROVISIONS

The City Charter prohibits councilmembers from voting on, attempting to influence or otherwise participating in decisions in which they have either a financial or a personal interest, and also requires that councilmembers make disclosure of any financial or personal interest creating a conflict with respect to any decision of the City Council.

A financial interest is defined as follows:

Financial interest means any interest equated with money or its equivalent. Financial interest shall not include:

- (1) 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;
(Emphasis added.)

A personal interest is defined as follows:

. . . 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. (Emphasis added.)

BOARD'S OPINION REGARDING THE CONFLICT

Personal Conflict of Interest.

After considering the Complaint, statements made to the Board by Mr. Bastian and statements made to the Board by Councilmember Edwards, the Board concluded that Councilmember Edwards was possessed of a personal conflict of interest in participating in the Council deliberations and vote on the amendments to the Ordinance, because those amendments related specifically to areas in the West Side Neighborhood located in close geographic proximity to property owned by Councilmember Edwards. (The Board did not believe that Councilmember Edwards was possessed of a conflict of interest in generally participating in Council decision-making regarding the West Side Neighborhood Plan and zoning of the West Side Neighborhood, but that when amendments were proposed pertaining to property in close geographic proximity to his property, Councilmember Edwards should have recognized a conflict of interest, disclosed the conflict and refrained from any further participation.)

Made in Good Faith.

After consideration of the information presented to the Board, the Board concluded that Councilmember Edwards' oversight in failing to recognize or disclose his conflict of interest was not motivated by self interest and was made in good faith, triggered by Councilmember Edwards' desire to respond to neighborhood input at the Council meeting and his close involvement in the development of the East Side and West Side Neighborhood Plans, dating back to his membership on the Planning and Zoning Board.

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No Financial Conflict of Interest.

The Board further considered the question of whether Councilmember Edwards was possessed of a financial conflict of interest. (The Board concluded that Councilmember Edwards was possessed of a personal conflict of interest because his ownership of property in the area under consideration by reason of the amendments to Ordinance No. 113, 1991, created a close business concern which would, in the judgement of a reasonably prudent person, tend to impair independence of judgment or action in the performance of his official discretionary duties.) The Board did not believe that it was reasonable to conclude, without undue speculation, that Councilmember Edwards was possessed of a financial conflict of interest, because the Board was unable to determine with any certainty whether any financial benefit which might have accrued to Councilmember Edwards was "foreseeable or measurable." Accordingly, the Board concluded that Councilmember Edwards was possessed of a personal conflict of interest but not a financial conflict of interest.

BOARD RECOMMENDATION REGARDING THE ZONING DECISION

Since the Board concluded that Councilmember Edwards was possessed of a conflict of interest in participating in the zoning decision as it relates to the amendments that were proposed to Ordinance No. 113, 1991, the Board recommends that Council consider whether the zoning established for the strip of land which was the subject of the amendments (the so-called "buffer strip") is the appropriate zone for that strip of land. The Board does not believe that the zoning for the entire West Side area needs to be considered again as to its appropriateness, but only that the zoning for the buffer strip be readdressed by the City Council.

This advisory decision was reviewed and approved by Councilmember Maxey and Councilmember Fromme, regular members of the Ethics Review Board, and by Councilmember Azari, as an alternate member of the Ethics Review Board, who was appointed to serve because the questions addressed pertain to the third regular member of the Ethics Review Board, Councilmember Edwards. This decision is to be distributed to the members of the City Council and filed with the City Clerk, to be maintained in the permanent file of findings for the Ethics Review Board.

Dated this 13th day of August, 1992.


W. Paul Eckman, Deputy City Attorney

93-3
OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS

May 28, 1993

The Ethics Review Board ("the Board") met on the above-referenced date to render an advisory opinion in response to an inquiry initially presented by Councilmember Bob McCluskey, which was referred to the Ethics Review Board by Councilmember Alan Apt. The question presented is whether Councilmember McCluskey would have a conflict of interest in participating in Council decisions dealing with the proposed Old Town Master Drainage Plan ("the Plan.")

BACKGROUND INFORMATION

According to the Plan, certain storm drainage improvements would be constructed to alleviate flooding problems that have occurred in the Old Town Drainage Basin ("the Basin"). As with other storm drainage basins, the cost of the proposed improvements would be allocated among the properties within the Basin. There are approximately 4,000 such properties. The owners of those properties would be assessed fees to fund the improvements. These fees would be calculated proportionately among the properties according to the size and amount of impervious surface of each property.

Councilmember McCluskey is the president of Poudre Valley Creamery, which owns properties within the Basin at the intersections of Laporte and Howes and Pine and Jefferson Street. The improvements proposed under the Plan would include an open drainage channel behind the property owned by Poudre Valley Creamery at Laporte and Howes.

Council's official involvement in these matters would be twofold. First, it would be required to approve the Plan for inclusion in Section 26-543 of the Code. This would establish the flood plain areas in the Basin for regulatory purposes, and it would approve certain capital improvements in the area. Secondly, Council would determine the fees to be paid by the owners of the property in the Basin pursuant to Section 26-511. While the formula for calculating the total amount to be paid by each property owner is established in the Code, Council would be called upon to determine the period of time over which the amount would be paid; this, in turn, would determine the amount of each property owner's monthly installments.

ISSUES PRESENTED

The first question presented for the Board's consideration is whether Councilmember McCluskey (or the other Councilmembers who reside in the Basin) would have a conflict of interest in participating in either of the Council decisions referenced above.

1. Applicable Standards.

Article IV, Section 9, of the City Charter essentially states that any officer or employee of the City (including Councilmembers) who has a personal or financial interest in any City decision must file a conflict of interest disclosure statement and refrain from voting on, attempting to influence or otherwise participating in such decision in any manner as an officer or employee. The terms "financial interest" and "personal interest" are defined as follows:

Financial interest means any interest equated with money or its equivalent. Financial interest shall not include:

- . . . (3) The interest of a recipient of public services when such services are generally provided by the city on the same terms and conditions to all similarly situated citizens, regardless of whether such recipient is an officer or employee; . . .

The definition of a personal interest under the City Charter is as follows:

. . . 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.)

2. Council Decision Regarding Fees.

Under the foregoing standards, the Board does not believe that Councilmember McCluskey's status as a potential fee payer in the Basin creates a conflict of interest for him in participating in Council's decision regarding the establishment of storm drainage utility fees for the Basin. In his capacity as a fee payer, Councilmember McCluskey has the same kind of interest in the establishment of those fees as do all of the other 4,000 or so property owners in the Basin. Even though the amount of each person's fee will vary, all fees will be established on the same terms and conditions, that is, they will be apportioned according to the size and amount of impervious surface of each property. Thus, it appears that, under the definition of a "financial interest," Councilmembers owning property in the Basin would not be considered to have a financial interest in the establishment of fees for the Basin, nor would they appear to have any "personal interest" in the fee decision.

3. Council Decision Regarding the Plan.

The next question is whether Councilmember McCluskey's property ownership in the Basin would create a conflict of interest for him in participating in Council's deliberations about the adoption of the Plan for the Basin. The Board views this as a closer question.

One of the improvements in question (an open drainage channel) is to be constructed adjacent to one of the properties in which Councilmember McCluskey holds an ownership interest. The purpose of this channel is to alleviate some major flooding which has occurred in the immediate area of the properties owned by Poudre Valley Creamery. In this respect, then, Councilmember McCluskey's interest in the adoption of the Plan may be said to be different from that of other property owners in the Basin.

When a Councilmember will be individually affected by a Council decision, the Board believes that the Councilmember's circumstances must be considered on a case-by-case basis to determine whether a reasonably prudent person would believe the Councilmember's interest in the decision to be primarily personal in nature, so that his or her independence of judgment on behalf of the City might be compromised. Among the factors to be considered are the following:

- The extent to which the decision "focuses" on the individual Councilmember. If a Councilmember's interest is like hundreds of others who are similarly situated, then it is likely that the Councilmember can participate in the decision. The smaller the group of affected interests, the more likely it is that the Councilmember who is a member of that group should not participate in the decision.
- The magnitude of the potential financial or personal impact of the decision on the individual Councilmember. If the Councilmember will only be slightly impacted, either financially or personally, by a Council decision, then he or she is less likely to have a financial or personal conflict of interest in the decision. On the other hand, if the impact will be a very substantial one, a conflict is more likely to be found.
- The need for the Councilmember to participate in the decision as an elected representative. If the decision is of substantial importance to a Councilmember's constituents, either as a district representative or as Mayor, then the Councilmember should carefully consider whether his or her decision to declare a conflict of interest would leave those constituents without a

representative voice in the decision. The constituents' entitlement to a representative voice must be balanced against the degree of personal interest which the Councilmember may have in the decision.

In applying these principles to the situation at hand, Councilmember McCluskey acknowledges that his primary concern about the proposed drainage improvements adjacent to property owned by Poudre Valley Creamery is personal in nature. Consequently, he believes that he should not participate in Council's decision whether to adopt the Plan. The Board believes that Councilmember McCluskey's decision is consistent with the application of the foregoing criteria. In this instance, although the monetary impact of the proposed improvements on the properties owned by Poudre Valley Creamery is unknown, the group of property owners immediately and directly affected by these storm drainage improvements is relatively small. Thus, the Council's approval of the Plan (including the particular improvements adjacent to these properties) would be focused in part on Councilmember McCluskey's individual interest. Additionally, this is not a situation in which Councilmember McCluskey's constituency would be adversely affected if he declared a conflict of interest and refrained from participating in Council's review of the Plan. The proposed improvements are to be constructed in the area in which Mr. McCluskey's business is situated, but not in the district which Councilmember McCluskey represents.

Therefore, the Board agrees with Councilmember McCluskey's conclusion that he should declare a conflict of interest in this matter.

ABILITY TO PARTICIPATE IN AN INDIVIDUAL CAPACITY

The next question is whether, notwithstanding the foregoing conflict of interest, Councilmember McCluskey may participate in an individual capacity in any neighborhood meetings which may subsequently be held to elicit property owner input regarding the Plan. In addressing this question, the Board notes that the City Charter only requires that a Councilmember who has a conflict of interest refrain from any official-capacity involvement in the decision in question. Thus, the Charter does not prohibit the kind of private capacity involvement that Councilmember McCluskey is contemplating.

The state rules of ethical conduct do not distinguish between personal and official capacity attempts to influence a decision in which one has a conflict, but the prohibition in the state statute is limited to attempts to influence the members of the governing body (the Council). There is no prohibition against talking to or

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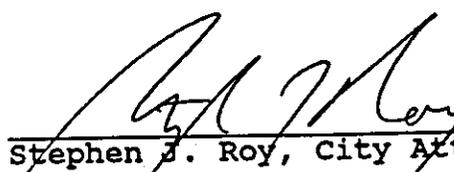
attempting to influence other governmental employees involved in the decision-making process. That state language reads as follows:

A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter. (Section 24-18-109[3][a], emphasis added.)

Thus, neither the state nor local laws prohibit a Councilmember from offering input to City staff as a private citizen regarding a matter in which he or she would have a conflict of interest if acting in an official capacity. Accordingly, the Board believes that Councilmember McCluskey should be able to do so. To suggest otherwise would be to unduly penalize Councilmembers by requiring that they forego the exercise of their rights as private citizens when they assume the office of Councilmember. The Board has two recommendations in this regard, however. First, the conflict of interest disclosure forms filed with the City Clerk should be modified so as to clarify that Councilmembers declaring a conflict of interest are free to participate in discussions with City staff or others regarding the subject matter of the decision. Secondly, Councilmembers who choose to exercise this right should, at the time of making any public statements regarding matters in which they have a conflict of interest, state that they are doing so in a private capacity.

This advisory opinion was reviewed and approved by Mayor Azari, Mayor Pro Tem Horak, regular members of the Ethics Review Board, and Councilmember Apt, who was serving as an alternate member in place of regular member McCluskey. This opinion is to be distributed to the members of the City Council and filed with the City Clerk, to be maintained in the permanent file of findings for the Ethics Review Board.

Dated this 10th day of June, 1993.



Stephen J. Roy, City Attorney

SJR:whm