

RESOLUTION 98-53
OF THE COUNCIL OF THE CITY OF FORT COLLINS
ACCEPTING THE ADVISORY OPINION AND RECOMMENDATION
NO. 98-1 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 February 25, 1998, to consider: (1) whether a member of the Landmark Preservation Commission (the "Commission") may appear before the Commission (or one of its committees) as a professional representing an applicant; (2) whether a member of the Planning and Zoning Board who has declared a conflict of interest on a matter may appear before the Board as a private citizen to urge a particular outcome; and (3) whether a member of the Planning and Zoning Board may participate in a decision of the Board and then later participate as a citizen when the matter is presented to the City Council, either on appeal or following a recommendation from the Planning and Zoning Board; and

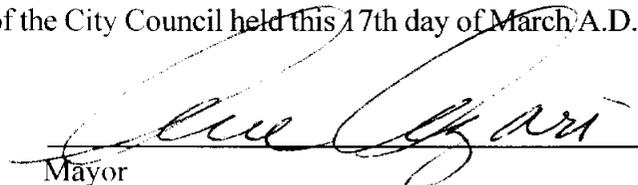
WHEREAS, the Board has issued Opinion No. 98-1 with regard to the foregoing issues; and

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.

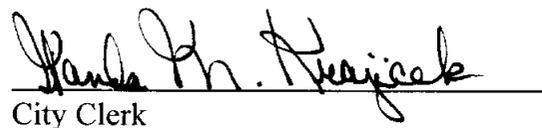
NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Opinion No. 98-1 of the Ethics Review Board, a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A," has been submitted to and reviewed by the City Council, and the Council hereby adopts the opinions and recommendations contained therein.

Passed and adopted at a regular meeting of the City Council held this 17th day of March A.D. 1998.



Mayor

ATTEST:



City Clerk

98-1
**OPINION OF THE ETHICS REVIEW BOARD
OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS**

February 25, 1998

The Ethics Review Board ("the Board") has been asked by the Council liaisons to the Landmark Preservation Commission ("the Commission") and to the Planning and Zoning Board ("the P & Z Board") to render opinions with regard to three issues. For the purposes of analysis, the first two questions have been combined.

ISSUE NO. 1 MAY A MEMBER OF THE LANDMARK PRESERVATION COMMISSION (THE "COMMISSION") APPEAR BEFORE THE COMMISSION (OR ONE OF ITS COMMITTEES) AS A PROFESSIONAL REPRESENTING AN APPLICANT?

AND

ISSUE NO. 2 MAY A MEMBER OF THE PLANNING AND ZONING BOARD WHO HAS DECLARED A CONFLICT OF INTEREST ON A MATTER APPEAR BEFORE THE PLANNING AND ZONING BOARD AS A PRIVATE CITIZEN TO URGE A PARTICULAR OUTCOME?

Previous Ethics Board Opinions:

In Opinion 91-2, the Ethics Review Board previously reviewed the question of whether members of City boards or commissions should appear before their own boards or commissions in a private capacity to present their views on a particular matter even though they have filed a conflict of interest disclosure statement with regard to the matter and were unable to participate in the decision as an officer or employee.

Although the conflict of interest provisions in the City Charter have been amended since the date of Opinion No. 91-2, the Charter provision relevant to this inquiry remains the same. It provides, in relevant part, as follows:

(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.* (Article IV, Section 9(b)(3). Emphasis added.)

Thus, as was true in 1991, the Charter is silent with regard to the ability of a board or commission member to appear before his or her own board or commission in a *private capacity* after a conflict of interest disclosure statement has been filed by such board or commission member.

Factual Setting:

In the case of the Landmark Preservation Commission, this question arises on occasions when an architect or other professional who is a member of the Commission has worked with a prospective applicant for approval of an exterior modification to a designated landmark property. Under these circumstances, the Commission member would generally file a conflict of interest disclosure statement and refrain from participating in the Commission's decision as to whether the proposed modification is acceptable under the provisions of the City Code. However, that member may have been retained by the applicant to represent his or her interests before the Commission and, for that reason, the Commission member, after filing of the conflict of interest disclosure statement, may wish to present the applicant's position to the Board in a professional capacity.

In the case of the P & Z Board, a member of that Board may file a conflict of interest disclosure statement because he or she lives in close proximity to the subject property of a development application. That P & Z Board member may then wish to express his or her views with regard to the impact that the development application may have on his or her property if approved by the P & Z Board.

Analysis and Recommendation:

The Board's opinion with regard to these issues remains the same as expressed in Opinion 91-2. The Board recognizes that a member of the Commission or the P & Z Board may, on occasion, need to appear in a personal capacity before his or her own commission or board in order to protect his/her own property interests. For example, in the case of a development application before the P & Z Board, a boardmember's own residence may be directly and substantially affected by the P & Z Board's decision. In that case, the P & Z Board members' right to protect his/her individual property interests should not have to be abandoned, and the Board member should be entitled to address his/her concerns to the P & Z Board.

However, when the interests involved are not entirely personal in nature but are instead professional in nature (i.e., the Commission or Board member is representing another individual as an advocate, whether with or without compensation), then the Board believes that the right to appear before the board or commission is outweighed by the City's need to protect the integrity and impartiality of the City's decision making processes. In that situation, the Board recommends that board and commission members not make such professional capacity presentations.

The Board recognizes that, in the case of the Commission, this recommendation will work a hardship on certain Commission members, since the Commission, in order to perform its functions under the Code, is required to have among its members a certain number of architects and persons educated

in historic preservation.¹ If Commission members are required to refrain from making presentations to the Commission during their term of service, it has been pointed out that this will likely diminish the pool of professionals who are willing to serve on the Commission. Nonetheless, the Board feels that the alternative, i.e., allowing Commission members to make presentations to the Commission on behalf of others, would create an appearance of impropriety that could call into question the impartiality of the Commission's decision-making process. Instead of allowing such presentations, the Board recommends that the Commission consider whether a shorter term of service for members of the Commission who fall within this category of professionals might be warranted, so as to minimize the period of time that they would be unable to appear before the Commission in a professional capacity. If the Commission believes that such shorter terms might be warranted, a recommendation to the City Council to that effect would be appropriate.

In summary, with regard to appearances before one's own board or commission, the Board recommends the same guidelines contained in Ethics Opinion 91-2, which are as follows:

1. Immediately upon discovery that a conflict of interest exists as defined in the City Charter, a board or commission member should file a conflict of interest statement with the City Clerk as required by the Charter. (He/she may also wish to file a disclosure statement with the Secretary of State under the relevant provisions of state law. The City Attorney should be consulted on this point.)
2. The board or commission member must thereafter refrain from participating in the discussions of the board or commission, voting on the matter or attempting to influence the decision as a board or commission member.
3. Any presentations made by the board or commission member in support of the proposal should be made in an individual capacity and not as a representative of any group or organization.
4. Each time that the board or commission member addresses the matter, he or she should clearly state that he/she is doing so in a private capacity and will

¹ The City Code states, in Sec. 2-277 that, in making appointments to the Commission, the City Council shall give due consideration to maintaining a balance of interests and skills in the composition of the commission and to the individual qualifications of the candidates including but not limited to their training, experiences, knowledge or interests in any one (1) or more of the fields of architecture-landscape architecture, architectural history, structural engineering, general contracting, urban planning, mortgage lending and commerce. The regulations of the Colorado Historical Society further require that at least three members of a seven-member commission such as the Landmark Preservation Commission "shall be professionals in preservation related disciplines such as architecture, architectural history, archaeology, history planning, or other historical preservation related disciplines such as urban planning, American studies, American civilization, cultural geography or cultural anthropology.

not be participating in the decision-making process. The opportunities for input that are made available to the board or commission member should be limited to those which would be available to any other member of the general public who is similarly interested in the decision.

ISSUE NO. 3 MAY A MEMBER OF THE PLANNING AND ZONING BOARD PARTICIPATE IN A DECISION OF THE BOARD AND THEN LATER PARTICIPATE AS A CITIZEN WHEN THE MATTER IS PRESENTED TO THE CITY COUNCIL, EITHER ON APPEAL OR FOLLOWING A RECOMMENDATION FROM THE PLANNING AND ZONING BOARD?

Again, this question is not addressed by the provisions of the City Charter, nor is it addressed in Opinion 91-2 or other opinions of the Board. The Board believes that when the decision of the P & Z Board is a quasi-judicial one and the matter is subsequently presented to the City Council on appeal, a member of the P & Z Board should be permitted to make a presentation to the Council on appeal only if he/she has filed a conflict of interest disclosure statement and has not participated in the P & Z Board's decision regarding the matter.

As noted above, in that situation, the member should be able to protect his or her property interests. If, however, the P & Z Board member has *not* filed a conflict of interest disclosure statement and has participated in the P & Z Board's decision, then the Board believes that it would be inappropriate for that member to appear before the Council. This is because the Council's decision on appeal must be based "on the record" and the record speaks for itself with regard to the reasoning of the Board. Extrinsic evidence should not be introduced at the hearing by an individual member of the Board with regard to the reasoning behind the P & Z Board's decision.²

When the matter presented to the City Council is *legislative* in nature, the Board believes that members of the P & Z Board or other boards or commissions who have made recommendations to the Council on that same subject matter should be free to express their individual opinions to the Council. In this situation, the Board believes that there is no ethical impropriety in expressing one's individual concerns at the Council level. However, the Board strongly encourages board and commission members to actively participate in their own board or commission discussions on these topics and to not bypass that opportunity to express one's views. It is important for the Council, in receiving recommendations from its boards or commissions, to fully understand the minority views of each board or commission on a particular subject, as well as the view of the majority. Therefore,

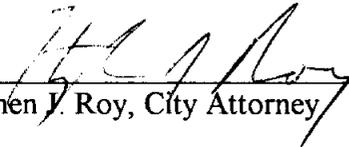
² It should also be noted that an individual board member would not generally have standing to appear before the Council as a "party in interest" with regard to any such appeal unless he/she *has* declared a conflict of interest, since those qualifying as parties in interest under the City Code are those whose property interests are likely to be immediately and directly affected by the P & Z Board's decision. (The City Charter states that a conflict of interest exists whenever a board or commission member 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.)

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board and commission members should make every effort to make their views known as members of their own boards or commissions as those recommendations to the Council are being formulated.

This advisory opinion was reviewed and approved by Mayor Azari, Mayor Pro Tem Smith and Councilmember Byrne, as members of the Ethics Review Board of the City Council. 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 meeting on March 17, 1998.

Dated this 25th day of February, 1998.



Stephen J. Roy, City Attorney

SJR:med