

RESOLUTION 2004-117  
OF THE COUNCIL OF THE CITY OF FORT COLLINS  
ACCEPTING THE ADVISORY OPINION AND RECOMMENDATION NO. 2004-1  
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 of board and commission members of the City; and

WHEREAS, the Ethics Review Board met on September 7, 2004, to consider whether Councilmember Kurt Kastein should declare a conflict of interest with regard to the improvements to be constructed at the new Southwest Community Park, now known as the Spring Canyon Park; and

WHEREAS, the Board has issued an advisory opinion with regard to this matter; 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

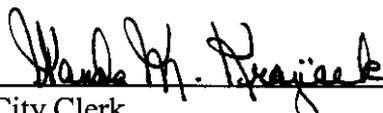
WHEREAS, the City has reviewed the opinion and recommendations of the Board and wishes to adopt the same.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS that Opinion No. 2004-1 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 21st day of September, 2004.

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

**OPINION 2004-1**  
**OPINION OF THE ETHICS REVIEW BOARD**  
**OF THE CITY COUNCIL OF THE CITY OF FORT COLLINS**

September 7, 2004

The Ethics Review Board (the "Board") met on the above-referenced date at the request of Councilmember Kastein Kastein, pursuant to the provisions of Sec. 2-569 of the City Code, to consider an ethical question posed by Councilmember Kastein.

**QUESTION PRESENTED.**

The question presented by Councilmember Kastein is whether he should declare a conflict of interest with regard to the improvements to be constructed at the new Southwest Community Park, now known as the Spring Canyon Park (hereinafter referred to as the "Park").

The conflict of interest question arises because Councilmember Kastein's residence is located immediately adjacent to the Park. A second question that arises with regard to this matter has to do with the extent to which Councilmember Kastein may participate in City discussions regarding the proposed youth sports complex in a *personal* capacity even if he declares a conflict of interest and has to refrain from attempting to influence such decisions in an *official* capacity.

The final design of the Park will be made by the City Council after receiving recommendations from City staff, the City's Parks and Recreation Board and any other boards that might be affected by the decision, which would probably include the Natural Resources Advisory Board and the Transportation Board. However, Council's formal decision will be limited to appropriating funds for construction of the Park improvements after discussing the design of those improvements at a study session. There will be no need for formal Council approval of the actual improvements.

**APPLICABLE LAW.**

City Charter provisions pertaining to this matter include the following:

*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.

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

*Personal interest* means any interest (other than a financial interest) by reason of which an officer or employee, or a relative of such 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.

(*Charter of the City of Fort Collins, Art. IV §9*)

The City Code also provides in Sec. 2-568(b)(2):

No councilmember shall represent any person or interest before the City Council or any board or commission of the City.

#### **PREVIOUS OPINIONS.**

There are several previous opinions of the Ethics Review Board that deal with the proximity of property owned and/or occupied by a Councilmember to areas of the City that are the subject of pending policy decisions. It is important to note that these decisions of the Board were rendered under a different definition of "personal interest" than the present Charter definition. That earlier definition read 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. (Emphasis added.)

Thus, the previous Charter definition of personal interest focused on independence of judgment rather than the existence of some direct and substantial benefit or detriment. Despite this difference in the two standards, the Board believes that the reasoning in these decisions is helpful in evaluating Councilmember Kastein's situation.

In Opinion 92-8 the Board determined that Councilmember Cathy Fromme had a conflict of interest in participating in Council deliberations regarding the possible acquisition of property close to her residence for open space and natural areas purposes. The guidelines established by the Board in that opinion were as follows:

1. Councilmembers should be able to participate in policy level decisions unless the policy decision is so immediately and directly tied to a financial or personal *interest* of the councilmember that the policy decision cannot be

effectively separated from the personal interest (as opposed to the personal views) of the councilmember.

2. A councilmember should not participate in a decision regarding the City's acquisition or the public or private use of property which is within 500 feet of a councilmember's residence, because, by definition, the 500 foot radius indicates that the councilmember is an affected party-in-interest who would have either a financial or personal interest in the outcome of that decision.
3. In particular instances, a councilmember may have a conflict of interest in a decision regarding a particular parcel of property even if he or she resides beyond the 500 foot notice radius, but that determination will have to be made on a case-by-case basis, and the existence of a conflict depends upon the nature of the decision involved and the nature of the councilmember's interest in the affected property.

In Opinion 95-6, the Board decided that Councilmember Chuck Wanner did *not* have a conflict of interest in participating in Council's deliberations regarding the Eastside and Westside Neighborhood Guidelines simply because Councilmember Wanner resided in one of the proposed historic districts. In reaching this conclusion, the Board relied heavily upon a previous opinion (Opinion 93-3) in which Councilmember Bob McCluskey was determined not to have a conflict of interest in participating in Council deliberations regarding the establishment of storm drainage utility fees that would affect property he owned in the storm drainage basin in question. The reasoning behind the Board's conclusion in Opinion 93-3 was 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. That also proved to be important in Opinion 95-6 where, similarly, there were approximately 3,000 residences in the City of which would be affected by the proposed Eastside and Westside Neighborhood Guidelines.

In rendering Opinion 93-3, the Board established other 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:

- **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.

#### **CONCLUSIONS AND RECOMMENDATIONS.**

After receiving input from Councilmember Kastein and City staff members and deliberating among themselves, the majority of the Board concluded that Councilmember Kastein does have a personal interest in the design of the Park which prevents him from participating in, or attempting to influence, City decisions on the subject in an official capacity. The Board believes that the "500-foot rule" previously established in Opinion 92-8 provides a useful guideline for determining when Councilmembers or board or commission members have a conflict of interest in a particular decision of the City by reason of the proximity of their residence or property they own to the site that is the subject of the City decision making process.

In this instance, Councilmember Kastein's residence is immediately adjacent to the Park and it is one of two dozen or so residences that may be directly and substantially impacted by the design of the Park, either in terms of property values or quality of life, or both. For that reason, even though Councilmember Kastein's views with regard to the Park design may be similar to others in his Council district or similar to members of the public at large, the Board believes that he should err on the side of caution and declare a conflict of interest.

The Board also believes, however, that Councilmember Kastein should not be constrained from expressing his personal views regarding the design of the Park to all officers and employees of the City involved in the decision making process, as long as he does so in a private capacity and on his own behalf. Because Sec. 2-568(a)(2) of the City Code prohibits Councilmembers from representing any person or interest before the City Council or any board or commission of the City, Councilmember Kastein should not seek to represent his neighborhood association or other persons

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or interests when presenting his views to either the City Council or any boards or commissions of the City .

This advisory opinion was reviewed and approved by Mayor Martinez, Mayor Pro Tem Bertschy and Councilmember Weitkunat, 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 21<sup>st</sup> day of September, 2004.

  
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Stephen J. Roy, City Attorney