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

July 19, 2016

[changes from July 18 version are marked]

The City Council Ethics Review Board (“the Board”) met on July 12, 2016, to render an advisory opinion on a question submitted to the Board by Councilmember Gino Campana. The question presented is the extent to which a member of a City board or commission (together referred to as “boardmember”) may take action as a private citizen (and not as a boardmember) to influence the decision of his or her board after declaring a conflict of interest in that decision. The pending inquiry also requests review of the question as it relates to City Councilmembers.

Bottom Line.

The Board interprets Article IV, Section 9(b)(3) of the City Charter to prohibit any officer or employee of the City from acting as an officer or employee in connection with a decision in which he or she has a financial or person interest. The Board recommends that Council adopt City Code provisions to limit boardmembers from other participation in those decisions (in a personal or representative capacity) except when a variance for special hardship has been granted. The Board recommends that City Councilmembers continue to be limited from representing any persons or interests before the Council or other City board or commission.

Background.

In contrast to the questions commonly before the Ethics Review Board for consideration, this inquiry relates not to whether a conflict of interest must be declared, but rather to ~~whether~~ what the limits ~~are on~~ apply to a boardmember or Councilmember once a conflict has been declared.

Article IV, Section 9(b) of the City Charter states as follows (*emphasis added*):

...
(b) Rules of conduct concerning conflicts of interest.

(1) Sales to the city. No officer or employee,¹ or relative² of such officer or employee, shall have a financial interest in the sale to the city of any real or personal property, equipment,

¹ The Charter defines “officer or employee” to mean “any person holding a position by election, appointment or employment in the service of the city, whether part-time or full-time, including a member of any authority, board, committee, or commission of the city, other than an authority that is:

- (1) established under the provisions of the Colorado Revised Statutes;
 - (2) governed by state statutory rules of ethical conduct; and
 - (3) expressly exempted from the provisions of this Article by ordinance of the Council.”
- Charter Art. IV, § 9(a).

material, supplies or services, except personal services provided to the city as an officer or employee, if:

- a. such officer or employee is a member of the Council;
- b. such officer or employee exercises, directly or indirectly, any decision-making authority concerning such sale; or
- c. in the case of services, such officer or employee exercises any supervisory authority over the services to be rendered to the city.

(2) Purchases from the city. No officer, employee or relative shall, directly or indirectly, purchase any real or personal property from the city, except such property as is offered for sale at an established price, and not by bid or auction, on the same terms and conditions as to all members of the general public.

(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.

(4) Disclosure procedure. If any officer or employee has any financial or personal interest requiring disclosure under subsection (3) of this section, such person shall immediately upon discovery thereof declare such interest by delivering a written statement to the City Clerk, with copies to the City Manager and, if applicable, to the chairperson of the public body of which such person is a member, which statement shall contain the name of the officer or employee, the office or position held with the city by such person, and the nature of the interest. If said officer or employee shall discover such financial or personal interest during the course of a meeting or in such other circumstance as to render it practically impossible to deliver such written statement prior to action upon the matter in question, said officer or employee shall immediately declare such interest by giving oral notice to all present, including a description of the nature of the interest.

(5) Violations. Any contract made in violation of this Section shall be voidable by the city. If voided within one (1) year of the date of execution thereof, the party obtaining payment by reason of such contract shall, if required by the city, forthwith return to the city all or any designated portion of the monies received by such individual from the city by reason of said contract, together with interest at the lawful maximum rate for interest on judgments.

~~Under p~~Past ethics opinions evaluating the Charter limitations on boardmembers ~~who have a conflict with a conflict~~ of interest, ~~there has been a distinction made~~have distinguished between

2 The Charter defines "relative" to mean: "the spouse or minor child of the officer or employee, any person claimed by the officer or employee as a dependent for income tax purposes, or any person residing in and sharing with the officer or employee the expenses of the household." Charter Art. IV, § 9(a).

representing the interests of others before a boardmember's board (not allowed where a conflict has been declared), and representing personal interests before that board (allowed in the interests of preserving personal rights of boardmembers). This distinction has raised concerns in recent months in part because some City boards include, or are required under the Code to include, professionals in fields related to that board's functions. ~~As a result, there~~ There are challenges posed by a bar on appearing in front of that board by board members, particularly those who are sole practitioners and do not have colleagues who can work on client matters as needed. In these situations, while the boardmember does not participate ~~in the matter~~ as a member of the board, there is a question as to the extent to which he or she must avoid any participation as an advocate or representative for an applicant or other party.

In addition to these Charter limitations on Councilmembers with conflicts of interest, Section 2-568(c)(2) of the Fort Collins Municipal Code provides that "No Councilmember shall represent any person or interest before the City Council or any board or commission of the City."

Application of City Charter Provisions.

1. "As an Officer or Employee."

A Council-adopted "Policy Statement on Ethics," in place from 1988 until it was superseded by the adoption of the conflicts provisions in the Charter in 1989, prohibited boardmembers from acting in a representative capacity for compensation to influence a decision of his or her board.

In contrast, the relevant Charter language, adopted by the voters in March 1989, prohibits a boardmember with a conflict of interest in a board decision from "attempting to influence, or otherwise participating in such decision in any manner as an officer or employee." (City Charter Article IV, Section 9(b)(3) (*emphasis added*)).

This Charter provision has been specifically addressed in three Ethics Opinions:

- Ethics Opinion 91-2 distinguished between boardmembers addressing their own personal interests and boardmembers representing the interests of others:

The Board believes that members of City boards or commissions, as non-elected citizen volunteers, should not be required to give up the right to protect their personal interests when they might be directly affected by a board or commission, even if they serve on that board or commission. This right should not extend, however, to representing interests other than their own individual interests. For example, while a member of the Zoning Board of Appeals should be able to argue in favor of a variance for his or her private residence, that same board member should not be permitted to serve in a representative capacity, with or without compensation, and make

presentations to the Zoning Board of Appeals on behalf of another person or entity, such as a developer or neighborhood association. (Ethics Opinion 91-2, page 2).

- Ethics Opinion 91-3, citing to Ethics Opinion 91-~~32~~, indicated that the limits on a Councilmember's participation did not extend to that Councilmember's spouse, so long as the Councilmember declared a conflict of interest and did not participate in any way in the subject Planning and Zoning Board decision. (Ethics Opinion 91-3, page 4).
- Ethics Opinion 98-1, which was approved by the City Council in Resolution 98-53,³ addressed the question of personal appearances by a boardmember on behalf of a client ~~in matters where~~ where the boardmember had declared a conflict of interest and was not participating ~~in the matter~~ as a member of the board. That opinion, also citing to Ethics Opinion 91-2 ~~in evaluating this issue~~, concluded that such appearances before one's own board in a representative capacity would not be allowed, but did not address whether other means of advocating to the board, or providing other materials for consideration by the board, on behalf of a client would also be prohibited. (Ethics Opinion 98-1, pages 3-4).

After a thoughtful review of these prior ethics opinions, the Board has carefully considered the language of the Charter, and is concerned ~~that the application of that applying~~ the Charter language to activities ~~that are~~ not carried out by an individual in his or her role "as an officer or employee" goes beyond the intended meaning and proper interpretation of the language of the Charter. (Please note that different considerations apply to the activities of Councilmembers, in contrast to boardmembers, as described below.)

The Board recognizes ~~that~~ there is a need to carefully govern both the involvement of boardmembers ~~in matters in which~~ where they have declared a conflict, and to avoid any appearance of impropriety that might result from boardmember advocacy to said member's own board. However, the Board believes it would be more appropriate for the Council to adopt City Code provisions establishing specific requirements and procedures regarding how boardmembers may participate in a matter once a conflict has been identified, rather than rely on a broad reading of the Charter provision. The Board also recommends ~~consideration of~~ an exception or variance process ~~thate~~ allows participation in circumstances of hardship or other special circumstances, provided that the decision making board could continue to carry out its decision making role properly.

2. "Attempting to Influence."

In addition, the Board has considered the question of what constitutes "attempting to influence" a decision. ~~In general, the~~ The Board concluded that participating in discussion of a particular

³ In July 1993, the City Council adopted Ordinance No. 064, 1993, which changed the process for adoption of ethics opinions so as to require Council review and approval.

matter as a boardmember is likely difficult to distinguish from “attempting to influence,” and should be avoided.

Many board decisions of significance are quasi-judicial matters that do not allow for ex parte communications or discussion with stakeholders outside of the hearing process. In those circumstances, the potential for confusion regarding the role in which an individual is acting is very limited. ~~Nonetheless, the~~

The Board believes guidelines are needed to set out the limits on and types of interactions that are permissible where a conflict of interest is present. For example, ~~distinction may be drawn between involvement of the guidelines could:~~

- Prohibit boardmembers from representing a party before that boardmember’s board, except when special hardship or other special circumstances create unfairness for the boardmember or other persons;
- Define representation of a party to include authoring of materials prepared to advocate or inform the board about a project, presentation of information to the board or interaction with the board to respond to questions;
- ~~Allow a design professional in the design or engineering of a project by a boardmember so long as the work does not include and involvement in active participation or interaction with the board, an active capacity as an advocate or respondent to questions;~~
- Clarify that although a boardmember may have a conflict of interest because his or her firm is actively working on a project, this means that the firm is not disqualified from the project so long as the boardmember recuses himself or herself as a boardmember; and
- Establish a disclosure process for a boardmember to use when the boardmember must appear before his or her board to protect a personal interest.-

3. Councilmember Appearances.

As noted above, express Code language governs concerning the second question, ~~that is, -~~ (may a Councilmember appear before Council, after declaring and disclosing a conflict of interest, and participate on behalf of an interested stakeholder if they do not personally appear before Council to advocate on behalf of another person), ~~express Code language governs.~~

Section 2-568(c)(2) of the Fort Collins Municipal Code provides that “No Councilmember shall represent any person or interest before the City Council or any board or commission of the City.” In addition, Colorado statute requires that members of local government governing bodies abstain from any matter in either a personal or an official capacity in the event of a conflict in order to avoid a breach of fiduciary duty and public trust. (Section 24-18-109(3)(a), C.R.S.).

In light of these provisions, the Board ~~was in general agreement agrees that~~ it is appropriate to hold Councilmembers to a higher standard and limit more strictly ~~the extent to which a~~ Councilmember

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~~may participate in any way~~ participation in any decision in which that Councilmember has a conflict of interest. ~~It was noted, however, that~~ Nevertheless, in extreme circumstances this ~~could~~ may preclude a Councilmember from defending his or her own personal interests.

Board Conclusions and Recommendations:

1. The language of Article IV, Section 9(b)(3) of the City Charter ~~should be and~~ is most reasonably interpreted to limit the actions of a City officer or employee only in his or her capacity as an officer or employee, and not outside of that role.
2. The Council should adopt City Code provisions to establish restrictions and requirements related to actions of boardmembers, in a representative capacity and in a personal capacity (outside of the boardmember role) ~~in connection with matters for matters~~ in which they have a conflict of interest, along the lines described in Section 2 on page 5, above. The Board ~~also~~ recommends ~~consideration of adoption of~~ a variance process ~~that would to~~ allow boardmember involvement in a matter (as a representative or a stakeholder) for limited exceptions in ~~the~~ case of hardships or other special circumstances that create unfairness for the boardmember or other persons.
3. The restriction on Councilmember representation of any persons or interests before the Council or a City board or commission should remain in place, although it may be beneficial to clarify this language to distinguish between representation where a Councilmember has a financial or personal interest (as defined in the Charter), and representation in the sense of advocating for certain policy or other interests in the role as a Councilmember.

This advisory opinion was reviewed and approved by Councilmembers Ray Martinez, Gino Campana, and Kristin Stephens, as the designated regular members of the Ethics Review Board. ~~Pursuant to~~ Under 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~~ This opinion ~~shall~~ will be considered by the City Council at its adjourned meeting on July 26, 2016.

Dated this 19th day of July, 2016.

Carrie M. Daggett, City Attorney

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Bottom Line.

The Board interprets Article IV, Section 9(b)(3) of the City Charter to prohibit any officer or employee of the City from acting **as an officer or employee** in connection with a decision in which he or she has a financial or person interest. The Board recommends that Council adopt City Code provisions to limit boardmembers from other participation in those decisions (in a personal or representative capacity) except when a variance for special hardship has been granted. The Board recommends that City Councilmembers continue to be limited from representing any persons or interests before the Council or other City board or commission.

Background.

In contrast to the questions commonly before the Ethics Review Board for consideration, this inquiry relates not to whether a conflict of interest must be declared, but rather to what limits apply to a boardmember or Councilmember once a conflict has been declared.

Article IV, Section 9(b) of the City Charter states as follows (*emphasis added*):

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(b) Rules of conduct concerning conflicts of interest.

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1 The Charter defines “officer or employee” to mean “any person holding a position by election, appointment or employment in the service of the city, whether part-time or full-time, including a member of any authority, board, committee, or commission of the city, other than an authority that is:

- (1) established under the provisions of the Colorado Revised Statutes;
- (2) governed by state statutory rules of ethical conduct; and
- (3) expressly exempted from the provisions of this Article by ordinance of the Council.”

Charter Art. IV, § 9(a).

2 The Charter defines “relative” to mean: “the spouse or minor child of the officer or employee, any

material, supplies or services, except personal services provided to the city as an officer or employee, if:

- a. such officer or employee is a member of the Council;
- b. such officer or employee exercises, directly or indirectly, any decision-making authority concerning such sale; or
- c. in the case of services, such officer or employee exercises any supervisory authority over the services to be rendered to the city.

(2) Purchases from the city. No officer, employee or relative shall, directly or indirectly, purchase any real or personal property from the city, except such property as is offered for sale at an established price, and not by bid or auction, on the same terms and conditions as to all members of the general public.

(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.

(4) Disclosure procedure. If any officer or employee has any financial or personal interest requiring disclosure under subsection (3) of this section, such person shall immediately upon discovery thereof declare such interest by delivering a written statement to the City Clerk, with copies to the City Manager and, if applicable, to the chairperson of the public body of which such person is a member, which statement shall contain the name of the officer or employee, the office or position held with the city by such person, and the nature of the interest. If said officer or employee shall discover such financial or personal interest during the course of a meeting or in such other circumstance as to render it practically impossible to deliver such written statement prior to action upon the matter in question, said officer or employee shall immediately declare such interest by giving oral notice to all present, including a description of the nature of the interest.

(5) Violations. Any contract made in violation of this Section shall be voidable by the city. If voided within one (1) year of the date of execution thereof, the party obtaining payment by reason of such contract shall, if required by the city, forthwith return to the city all or any designated portion of the monies received by such individual from the city by reason of said contract, together with interest at the lawful maximum rate for interest on judgments.

Past ethics opinions evaluating the Charter limitations on boardmembers with a conflict of interest have distinguished between representing the interests of others before a boardmember's board (not

person claimed by the officer or employee as a dependent for income tax purposes, or any person residing in and sharing with the officer or employee the expenses of the household." Charter Art. IV, § 9(a).

allowed where a conflict has been declared), and representing personal interests before that board (allowed in the interests of preserving personal rights of boardmembers). This distinction has raised concerns in recent months in part because some City boards include, or are required under the Code to include, professionals in fields related to that board's functions. There are challenges posed by a bar on appearing in front of that board by board members, particularly those who are sole practitioners and do not have colleagues who can work on client matters as needed. In these situations, while the boardmember does not participate as a member of the board, there is a question as to the extent to which he or she must avoid any participation as an advocate or representative for an applicant or other party.

In addition to these Charter limitations on Councilmembers with conflicts of interest, Section 2-568(c)(2) of the Fort Collins Municipal Code provides that "No Councilmember shall represent any person or interest before the City Council or any board or commission of the City."

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In contrast, the relevant Charter language, adopted by the voters in March 1989, prohibits a boardmember with a conflict of interest in a board decision from "attempting to influence, or otherwise participating in such decision in any manner as an officer or employee." (City Charter Article IV, Section 9(b)(3) (*emphasis added*)).

This Charter provision has been specifically addressed in three Ethics Opinions:

- Ethics Opinion 91-2 distinguished between boardmembers addressing their own personal interests and boardmembers representing the interests of others:

The Board believes that members of City boards or commissions, as non-elected citizen volunteers, should not be required to give up the right to protect their personal interests when they might be directly affected by a board or commission, even if they serve on that board or commission. This right should not extend, however, to representing interests other than their own individual interests. For example, while a member of the Zoning Board of Appeals should be able to argue in favor of a variance for his or her private residence, that same board member should not be permitted to serve in a representative capacity, with or without compensation, and make

presentations to the Zoning Board of Appeals on behalf of another person or entity, such as a developer or neighborhood association. (Ethics Opinion 91-2, page 2).

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- Ethics Opinion 98-1, which was approved by the City Council in Resolution 98-53,³ addressed the question of personal appearances by a boardmember on behalf of a client where the boardmember had declared a conflict of interest and was not participating as a member of the board. That opinion, also citing to Ethics Opinion 91-2, concluded that such appearances before one's own board in a representative capacity would not be allowed, but did not address whether other means of advocating to the board, or providing other materials for consideration by the board, on behalf of a client would also be prohibited. (Ethics Opinion 98-1, pages 3-4).

After a thoughtful review of these prior ethics opinions, the Board has carefully considered the language of the Charter, and is concerned that applying the Charter language to activities not carried out by an individual in his or her role "as an officer or employee" goes beyond the intended meaning and proper interpretation of the language of the Charter. (Please note that different considerations apply to the activities of Councilmembers, in contrast to boardmembers, as described below.)

The Board recognizes there is a need to carefully govern both the involvement of boardmembers where they have declared a conflict, and to avoid any appearance of impropriety that might result from boardmember advocacy to said member's own board. However, the Board believes it would be more appropriate for the Council to adopt City Code provisions establishing specific requirements and procedures regarding how boardmembers may participate in a matter once a conflict has been identified, rather than rely on a broad reading of the Charter provision. The Board also recommends an exception or variance process that allows participation in circumstances of hardship or other special circumstances, provided that the decision making board could continue to carry out its decision making role properly.

³ In July 1993, the City Council adopted Ordinance No. 064, 1993, which changed the process for adoption of ethics opinions so as to require Council review and approval.

2. “Attempting to Influence.”

In addition, the Board has considered the question of what constitutes “attempting to influence” a decision. The Board concluded that participating in discussion of a particular matter as a boardmember is likely difficult to distinguish from “attempting to influence,” and should be avoided.

Many board decisions of significance are quasi-judicial matters that do not allow for ex parte communications or discussion with stakeholders outside of the hearing process. In those circumstances, the potential for confusion regarding the role in which an individual is acting is very limited.

The Board believes guidelines are needed to set out the limits on and types of interactions that are permissible where a conflict of interest is present. For example the guidelines could:

- Prohibit boardmembers from representing a party before that boardmember’s board, except when special hardship or other special circumstances create unfairness for the boardmember or other persons;
- Define representation of a party to include authoring of materials prepared to advocate or inform the board about a project, presentation of information to the board or interaction with the board to respond to questions;
- Allow design or engineering of a project by a boardmember so long as the work does not include active participation or interaction with the board;
- Clarify that although a boardmember may have a conflict of interest because his or her firm is actively working on a project, this means that the firm is not disqualified from the project so long as the boardmember recuses himself or herself as a boardmember; and
- Establish a disclosure process for a boardmember to use when the boardmember must appear before his or her board to protect a personal interest.

3. Councilmember Appearances.

As noted above, express Code language governs concerning the second question (may a Councilmember appear before Council, after declaring and disclosing a conflict of interest, and participate on behalf of an interested stakeholder if they do not personally appear before Council to advocate on behalf of another person).

Section 2-568(c)(2) of the Fort Collins Municipal Code provides that “No Councilmember shall represent any person or interest before the City Council or any board or commission of the City.” In addition, Colorado statute requires that members of local government governing bodies abstain from any matter in either a personal or an official capacity in the event of a conflict in order to avoid a breach of fiduciary duty and public trust. (Section 24-18-109(3)(a), C.R.S.).

In light of these provisions, the Board agrees it is appropriate to hold Councilmembers to a higher standard and limit more strictly Councilmember participation in any decision in which that Councilmember has a conflict of interest. Nevertheless, in extreme circumstances this may preclude a Councilmember from defending his or her own personal interests.

Board Conclusions and Recommendations:

1. The language of Article IV, Section 9(b)(3) of the City Charter is most reasonably interpreted to limit the actions of a City officer or employee only in his or her capacity as an officer or employee, and not outside of that role.
2. The Council should adopt City Code provisions to establish restrictions and requirements related to actions of boardmembers, in a representative capacity and in a personal capacity (outside of the boardmember role) for matters in which they have a conflict of interest, along the lines described in Section 2 on page 5, above. The Board recommends adoption of a variance process to allow boardmember involvement in a matter (as a representative or a stakeholder) in the case of hardships or other special circumstances that create unfairness for the boardmember or other persons.
3. The restriction on Councilmember representation of any persons or interests before the Council or a City board or commission should remain in place, although it may be beneficial to clarify this language to distinguish between representation where a Councilmember has a financial or personal interest (as defined in the Charter), and representation in the sense of advocating for certain policy or other interests in the role as a Councilmember.

This advisory opinion was reviewed and approved by Councilmembers Ray Martinez, Gino Campana, and Kristin Stephens, as the designated regular members of the Ethics Review Board. Under 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. This opinion will be considered by the City Council at its adjourned meeting on July 26, 2016.

Dated this 19th day of July, 2016.

Carrie M. Daggett, City Attorney

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