

Ethics and Land Use Planning

**Planning and Zoning for Lawyers
and Public Officials**

June 9, 2006

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The issue of ethics has at least three dimensions in the land use context—legal ethics for the land use attorney who either represents a local government or a landowner, professional ethics for the land use planner or land use professional, and state law- or local law-mandated ethics codes for the local governmental official or employee who is involved in decision-making related to a land use application or request. While not focusing (too much) on court cases, the purpose of this paper is to address more practical ethics issues confronted at the local government level.

1. What state law governs a local government official's participation in a land use matter in which he/she may have a conflict of interest?

In the absence of a local ethics ordinance that is more stringent than applicable state law, the key provisions of state law relative to conflicts of interest is Chapter 171 of the Texas Local Government Code. This provision of state law is the “floor” of ethical conduct for local public officials.¹ Chapter 171 provides, in part, as follows:

§ 171.003. PROHIBITED ACTS; PENALTY.

(a) A local public official commits an offense if the official knowingly:

(1) violates Section 171.004;

(2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or

(3) acts as surety on any official bond required of an officer of the governmental entity.

¹ According to Section 171.001(1) of the Texas Local Government Code, a “local public official” means a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.” In the local government land use context, city employees, city councilmembers, planning and zoning commission members and members of a zoning board of adjustment all qualify as “local public officials” for conflict of interest purposes.

(b) An offense under this section is a Class A misdemeanor.

§ 171.004. AFFIDAVIT AND ABSTENTION FROM VOTING REQUIRED.

(a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

A. Filing an Affidavit and Abstention

Based on the foregoing statutory provisions, any local public official who has a substantial interest in a business entity or real property must do the following: (1) file an affidavit describing the nature of the substantial interest (the affidavit usually is filed with the city secretary and kept on record) and (2) abstain from **all** participation in the matter.

On occasion, particularly when councilmembers are involved, the question arises regarding "participation." Some view it very narrowly—for example, the councilmember who is conflicted simply removes

himself/herself from the council seat and stands in the back of the room and is free to discuss the matter with others as long as there is no participation in the city council's consideration of the land use matter. Others take a more expansive view of the prohibition and conclude that no "further participation" means absolutely no participation in the matter at any stage of the city's consideration of the matter, whether at the staff level, council level or with those seeking the land use decision. As a practical matter, due to the criminal penalties involved (a Class A misdemeanor), I certainly suggest the correct approach is the latter approach. Therefore, I advise my clients that once it is determined that there is a conflict of interest involving a councilmember, there is a complete divorce between the councilmember and the remaining members of the city council and the city staff and, out of an abundance of caution, between the councilmember and the members of the public or applicant who have an interest in the matter before the city and its governing body and/or commissions.

B. Substantial Interest

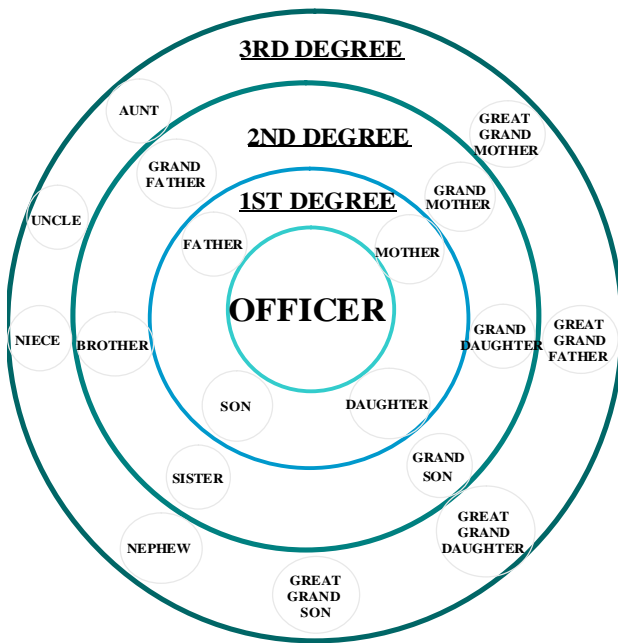
As a consequence of former law that generally held a local public official could not participate in a decision if he/she had an interest, direct or indirect, in a contract or other matter,² and the inherent ambiguity and difficulty in applying that standard to practical situations, Chapter 171 spells out what constitutes a "substantial interest" for conflict purposes. There are two aspects of "substantial interest": a substantial interest in real property and a substantial interest in a business entity.

A local public official has a substantial interest in a business entity if (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of

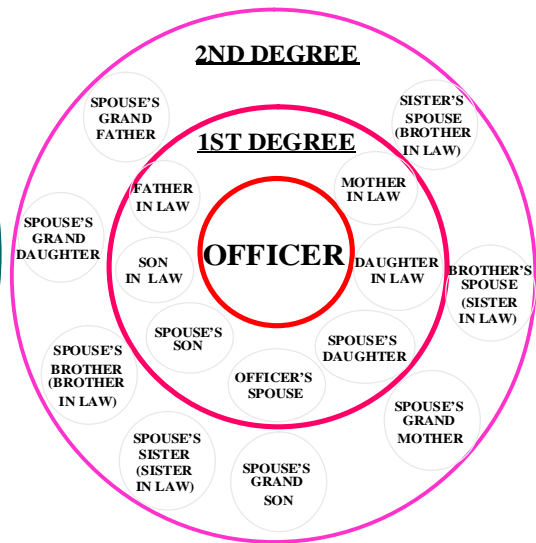
² Even though language about "direct or indirect" interest is not found in Chapter 171 of the Local Government Code, many municipal charters still contain that prohibition. For example, Section 11.02 of the Flower Mound Town Charter provides, in part, that "[n]o officer or employee of the Town of Flower Mound shall have a financial interest, direct or indirect, in any contract with the Town, or be financially interested, directly or indirectly, in the sale to the Town of any land, material, supplies or services, except on behalf of the Town as an officer or employee. Any willful violation of this section shall constitute malfeasance in office, and any officer or employee guilty thereof shall forfeit his office or position." The ambiguity surrounding what may be considered an "indirect interest" should cause any municipal attorney a great deal of concern since such a prohibited interest could result in forfeiture of office by the employee or officer.

the fair market value of the business entity; or (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year. Tex. Local Gov't Code, § 171.002(a). A local public official has a substantial interest in real property "if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more." *Id.*, § 171.002(b). The applicable statute also provides that a local public official is considered to have a substantial interest for purposes of Chapter 171 of the Local Government Code "if a person related to the official in the first degree by consanguinity or affinity . . . has a substantial interest under this section." *Id.*, § 171.002(c). Those relationships include the following relatives: parents, children [consanguinity relationships], spouse, spouse of parents or children, spouse's parents and spouse's children and stepparents or stepchildren [affinity relationships]. Be advised that the affinity relationships continue after divorce or death if there is a living child of the marriage. See Tex.Gov't Code § 573.024(b).

**Consanguinity Kinship Chart
(Relationship by Blood)**



**Affinity Kinship Chart
(Relationship by Marriage)**



C. Special Economic Effect

One of the more problematic issues that occasionally arises during a city council's consideration of a land use matter (particularly in zoning cases) is whether a councilmember must abstain if he/she lives adjacent to or near the property under consideration for a zoning change. Section

171.004(a) of the Local Government Code provides, in part, that a local public official has a substantial interest (i) in a business entity if “the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public” and (ii) in real property “if it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.” *Id.* Similarly, Texas Attorney General Opinion DM-130 (1992) addresses city councilmembers abstaining from participating in zoning decisions and voting if the zoning matter affects that councilmember’s residence.

In that opinion, the Attorney General was asked to render an opinion whether a home-rule city councilmember “is barred from voting on a zoning matter affecting territory in which the member owns a residence.” In response, in an opinion that I believe provides little substantive guidance, Attorney General Dan Morales wrote that Chapter 171 of the Local Government Code “would, in certain circumstances, bar a city council member’s voting on a zoning matter affecting territory in which the member’s residence is located.” General Morales wrote that “a zoning matter affecting territory in which the member’s residence was located would, we think, clearly ‘involve’ such ‘real property,’ within the meaning of section 171.004. A council member’s interest in his residence would be a ‘substantial interest’ in ‘real property’ within the meaning of section 171.004 if his real property interest in the residence amounted to ‘equitable or legal ownership with a fair market value of \$2,500 or more.’” *Id.*, at 2. The Attorney General further wrote that if the councilmember had a “substantial interest” in his residence, “he would be required to abstain from voting in the case of a zoning matter affecting territory in which the residence was located only if it was ‘reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.’” *Id.* Additionally, the Attorney General “punted” on providing guidance to local governments in determining whether and how to apply the “special economic effect” test: “Whether it would be ‘reasonably foreseeable’ . . . that an action on a voting matter will have a ‘special economic effect’ on the value of the member’s residence ‘distinguishable from its effect on the public,’ so as to trigger the affidavit and abstention requirements of [Chapter 171 of the Texas Local Government Code], would, of course, depend on the facts of the particular case.”

With all due respect to the Attorney General’s Office, this opinion, at least in my estimation, does not provide local officials with much practical guidance in dealing with councilmember conflicts of interest. While it is obvious that a councilmember who is an applicant seeking a

zoning change from the city cannot participate in the city council's consideration of his application, what if the councilmember lives within 200 feet of an area to be rezoned—will there be a “special economic effect” on his property different from the public as a whole? What if he resides 300 feet from the area to be rezoned? Will his property values go up, go down or will there be no effect? How do you make such a determination since the “special economic effect” of a zoning matter is at best speculative?

Although I believe the foregoing questions cannot be answered since they involve rank speculation, since a councilmember may be at risk politically and criminally if a “wrong” decision is made, the key may be the adoption of an ethics code by the city that spells out those situations where a councilmember automatically has a conflict of interest and may not participate in a zoning decision. Indeed, many municipalities have adopted ordinances that specifically address this issue. In Flower Mound, for example, the Town's Code of Ethics (see Town of Flower Mound, Texas, Code of Ordinances, ch. 2, § 2-411 *et seq.*) prohibits councilmembers and commissioners from “[p]articipat[ing] in any vote or decision relative to any amendment to the town's comprehensive master plan or any change in the zoning classification of property if the officer . . . or a relative of the officer . . . has any interest in any property within 200 feet of the property which is the subject of the amendment to the town's comprehensive master plan or on which the change in zoning classification is proposed. . . .” *Id.* § 2-415(15). Any officer “who has any such interest [is] legally disqualified from participating in any vote or decision relative to the comprehensive master plan amendment or change in zoning classification.” *Id.*

2. Are there specific rules for conflicts of interests for platting and subdivision matters?

Yes. Section 212.017(d) of the Texas Local Government Code provides that “[i]f a member of the municipal authority responsible for approving plats³ has a substantial interest in a subdivided tract, the member shall file, before a vote or a decision regarding the approval of a plat for the tract, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter. . . .” A “substantial interest,” not unlike its counterpart in Chapter 171 of the Texas Local Government Code, is defined as follows:

³ In Texas, plat approval is usually undertaken by either the city council or the city's planning and zoning commission.

(b) A person has a substantial interest in a subdivided tract if the person:

(1) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more;

(2) acts as a developer of the tract;

(3) owns 10 percent or more of the voting stock or shares of or owns either 10 percent or more or \$5,000 or more of the fair market value of a business entity that:

(A) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more; or

(B) acts as a developer of the tract; or

(4) receives in a calendar year funds from a business entity described by Subdivision (3) that exceed 10 percent of the person's gross income for the previous year.

Tex. Local Gov't Code, § 212.017(b). A local public official who has a substantial interest must file an affidavit stating the nature and extent of the interest and must abstain from further participation in the matter. *Id.*, § 212.017(d). Anyone who violates Subsection (d) commits a Class A misdemeanor. *Id.*, § 212.017(e). Further, one key distinction between Chapter 212 and Chapter 171 conflicts of interest is that a person who "acts as a developer" of property by law has a substantial interest in that property according to Chapter 212, whereas in Chapter 171, a developer would only have a substantial interest if he/she met the specific requirements related to "substantial interest."

One issue that should be kept in mind is the situation where a supermajority vote of a city council is legally required, e.g., city council approval of a zoning amendment after the planning and zoning commission has denied the request (see, e.g., Tex. Local Gov't Code, § 211.006(f) and the applicable local ordinance) or where neighbors protest the zoning request (*Id.*, § 211.006(d)). Any councilmember who is disqualified from voting due to a conflict of interest is not counted in determining the 3/4ths majority required to adopt the zoning request. Thus, normally a 5-member city council would be required to adopt the

zoning request with 4 affirmative votes out of 5; however, if a councilmember is disqualified due to a conflict of interest, only 3 votes out of 4 would be required to adopt the zoning request since the member with a conflict of interest is disqualified from voting as a matter of law.

3. May an applicant's attorney contact the mayor or a councilmember to discuss a pending land use matter before the city council?

No. While there is no prohibition against a non-attorney applicant contacting the mayor or a councilmember to discuss his/her pending application, an attorney for the applicant may run afoul of the rules of professional responsibility (and thus possibly be subject to a grievance being filed against him/her) if he/she contacts the mayor or a councilmember without contacting the local government's attorney. Specifically, in Texas, Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct addresses this issue:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

...

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

An Ethics Committee Opinion is directly on point. In Ethics Opinion 474 (June 1991), the Texas Supreme Court Professional Ethics Committee was asked to determine the ethical issues associated with the following fact situation:

Plaintiff has sued a municipality. The city attorney of the municipality represents the city and is engaged in settlement

negotiations with plaintiff through plaintiff's counsel. Defendant, with the city counsel's [sic, council's] approval, has offered a certain sum in settlement. Plaintiff has taken the position that the amount offered is inadequate. Unbeknownst to the city attorney's office, plaintiff's counsel telephones an individual counsel [sic, council] member to express his disapproval of the city's settlement offer. When questioned about the propriety of such contact, plaintiff's counsel refuses to acknowledge that the prohibition of such contact with the opposition's client is applicable when the client is a municipality.

Question Presented

Is the communication by plaintiff's counsel with city counsel [sic, council] members described above a violation of Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct?

Discussion

Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides in part as follows:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) For the purpose of this rule, "organization or entity of government" includes:

(1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or

(2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Conclusion

Yes. These provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

4. Prior to voting on a land use matter, may members of a city council or planning and zoning commission go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

Yes, but caution also is advised in doing so. It is clear that in Texas the zoning or rezoning of property is a legislative act. See *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (en banc), cert. denied, 475 U.S. 822 (1986). With such legislative authority comes absolute legislative immunity for the public officials exercising it. See *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

While legally there may be little concern about the information a city councilmember, for example, receives before a council meeting about a specific case, the political aspects of that case may mandate more cautious behavior by the city councilmember. Thus, while talking to a neighbor opposed to the zoning case may be legally permissible, politically there may be an appearance of impropriety or predilection to reach a decision without going through the public hearing process. Further, Texas municipalities must follow the Texas Open Meetings Act (Tex. Gov't Code, ch. 551) and its prohibition of deliberation outside a properly noticed public hearing and meeting.

5. Prior to voting on a variance or other authorized land use matter, may members of a zoning board of adjustment go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

No. It is equally clear in Texas that members of a zoning board of adjustment act in a quasi-judicial capacity. Consequently, the ex parte receipt of information or opinions is unfair and may deprive an applicant of due process. As a noted commentary states, “[a] situation which presents the element of unfairness is for the views of one party to a

proceeding before the board [of adjustment] to be presented to the board under circumstances which deprive the opposing party of the opportunity to know what was presented and the further opportunity to respond to it." *Rathkopf's The Law of Zoning and Planning*, § 57.68 at 57-136. Thus, to survive a constitutional procedural due process challenge, the following elements must be present: (1) an unbiased decision, (2) adequate notice of the hearing, (3) a hearing in which witnesses are sworn and in which there is an opportunity to present evidence and an opportunity for cross-examination, and (4) a decision based on the record supported by reasons and findings of fact. See *Texas Municipal Zoning Law*, § 6.006 at 6-11 (3d ed. 1999).

6. What is a good, basic checklist for local public officials as a protective strategy to ensure ethical compliance?

While every local government should consult with its attorney about ethical issues, every local government official should ask the following basic questions to ensure ethical compliance:

1. Have I reviewed Chapter 171 of the Texas Local Government Code?
2. Have I reviewed my city's ethics code?
3. Do I engage in a business in any way related to issues which may come before me (as a councilmember, commissioner, board member, employee or other officer)?
4. Could my business potentially benefit or be harmed by a decision of the council, commission or board on which I serve?
5. Am I or a family member licensed or engaged in any of the following professions that may cause me, my firm or family member to appear before the council, commission or board on which I serve:
 - architect
 - attorney
 - builder or developer
 - engineer
 - surveyor
 - mortgage broker/agent
 - realtor
 - contractor or subcontractor
 - title insurance company?

6. Do I have real estate investments that could cause a conflict of interest?

7. Do I have stock or other investments in any company or organization which may appear before the council, commission or board on which I serve?

8. Am I related to or in business with another municipal official that may result in a conflict of interest for me?

9. Do I know where to go if I find out that I have a conflict of interest?

Conclusion

Unfortunately most ethical issues faced by local governmental officials tend to be somewhat “gray” and rarely is it clear that a conflict indeed exists. The ambiguity whether there is an ethical issue may result in a major problem for the local government, as noted in the supermajority vote discussion earlier in this paper. Nevertheless, the safer course always is to conclude there is a conflict if indeed reasonable minds may differ. With a backdrop of criminal sanctions, attention should always be paid to fact situations in the land use context that raise ethical concerns.