

**THE DEVIL IN THE DETAILS:**

**AN ETHICAL JOURNEY TOWARD**

**GOVERNMENTAL APPROVALS**

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## **Author's Bio**

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This paper is presented as a general statement of the law for use by attorneys. No specific legal advice is intended nor should any be inferred. Those who review and are not attorneys should consult a licensed attorney for assistance and counsel.

## **I. INTRODUCTION**

Many times those who are in the municipal arena find themselves faced with ethical issues and dilemmas. A particularly ripe area for these issues is in the area of land use and development matters, in large part because this is the most common area where residents and/or owners of property (and their representatives) within the city must interact with City staff to receive approval from City commissions and/or councils for many of the things that they desire to do with their property. Sometimes these individuals are *not* represented by legal counsel or other professional representative which can lead to more concerns or issues. Finally, these concerns or issues can be further complicated in smaller cities and towns where multiple hats are worn by individuals and most everyone knows everyone else. This paper intends to present the framework of regulations that control various parties, address how some situations can be viewed from various sides and offer suggestions as to ways to deal with and/or prevent such situations.

## **II. CLASSIFICATIONS**

Generally in classifying the players, one initially carves them into two groups: Political subdivision and the landowner/applicant. From there, one can further break them down: 1) the City staff (e.g. land use planner, public works director), the local governmental official (e.g. the board member, commissioner and/or council person), and the attorney who represents the City (may or may not be an employee); or 2) the landowner/applicant/developer, and attorney, if represented. Ethical guidance for many of these individuals can be found in the professional ethics for the planner (American Planning Association and its local chapter) and possibly other city personnel (Engineer, Surveyor), the ethics codes for the local official (Texas Local Government Code, Chapter 171, Texas Local Government Code, Section 212.017, or perhaps a local ethics ordinance) and the legal ethics for those who represent either side (The American Bar Association Model Rules of Professional Conduct and the Texas Disciplinary Rules of Professional Conduct).

## **III. REGULATIONS APPLICABLE TO THE LOCAL OFFICIAL:**

Chapter 171, Texas Local Government Code provides the minimum amount of ethical conduct for local public officials.<sup>1</sup> Chapter 171 provides, in part, as follows:

§ 171.003. Prohibited Acts; Penalty.

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

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<sup>1</sup> According to § 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.”

- (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.

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

It is important to note that by definition then, councilmembers, planning and zoning commission members, zoning board of adjustment members and city staff all qualify as “local public officials” for conflict of interest purposes.

What is a violation of Section 171.004<sup>2</sup> Based upon a review of this section, an official would violate Section 171.004 if he or she failed to (1) file an affidavit describing the nature of the substantial interest with the City (usually kept with official City records) and (2) abstain from all participation in the matter. This triggers the at least two questions - what is meant by “substantial interest” and “participation.”

One must look to whether the official has a substantial interest in real property or a substantial interest in a business entity. As for real property, if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more,” that official would be considered to have a substantial interest.<sup>3</sup> This substantial interest would be applicable if a person related to the official in the first degree of consanguinity or affinity has the substantial interest as defined herein.<sup>4</sup> Spouses, children, parents, spouses of parents or children, spouse’s parents and children and stepchildren/stepparents are included.<sup>5</sup>

As for a business entity interest: “if the official 1) owns 10% or more of the voting stock or shares of a business entity, or owns either 10% or more or \$15,000 or more of the fair market value of

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<sup>2</sup> See, Tex. Loc. Gov’t Code, Sec. 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.

<sup>3</sup> *Id.*, § 171.002(b), Tex. Loc. Gov’t Code

<sup>4</sup> *Id.*, § 171.002(c), Tex. Loc. Gov’t Code

<sup>5</sup> See, Tex. Gov’t Code, Sec. 573.024(b) - the affinity relationships continue after divorce or death if there is a living child of the marriage.

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