

MEMORANDUM

TO: All Newly Appointed Flower Mound Board and Commission Members

FROM: Town Attorney's Office

RE: Conflict of Interest Issues

Congratulations on your recent appointment to a Flower Mound board or commission. The Town is a dynamic organization and you no doubt will be challenged by the projects and issues that you will address. One of the key issues you will have to resolve on a personal basis when you consider agenda items at the board and commission level is whether you, or a member of your family, may have a conflict of interest that disqualifies you from discussing, participating in or voting on an application. Our office has attempted to provide you with a question and answer format about state conflict of interest laws and the Town's code of ethics. We have utilized provisions of certain publications from the Texas Attorney General's Office as well as documents we have prepared in the past about the Town's code of ethics.

State Conflict of Interest Provisions (Chapter 171, Texas Local Government Code)

Every time a local public official participates in contracting with his or her governmental entity or owns real property that may be affected by that entity's actions, the official must consider whether his or her discussion, decision or vote on an item will violate either state conflict of interest laws or the Town's Code of Ethics ordinance. Public officials must be aware of the applicable standards for determining when such a conflict of interest may exist and how such conflicts must be handled. The following questions and answers provide a brief explanation of the general conflict of interest laws that apply to Town officials.

1. What conflict of interest laws apply to local public officials in Texas?

The general conflict of interest law for all Texas municipal officials, as well as officials of other Texas political subdivisions, is found in Chapter 171 of the Texas Local Government Code. Chapter 171 establishes the standard for determining when a local official has a conflict of interest that would affect his or her ability to discuss, decide or vote on a particular item. Chapter 171 conflict of interest provisions apply to all local public officials. "Local public officials" are defined to include: (1) elected officials, such as the members of the Town Council; and (2) appointed officials who exercise responsibilities that are more than advisory in nature.

2. Do conflict of interest laws apply to persons appointed to local boards and commissions (e.g., Planning and Zoning Commission members)?

Chapter 171 conflict of interest laws apply to persons appointed to local boards and commissions if the board or commission exercises powers that are more than advisory in nature. For example, all members of the Town's Planning and Zoning Commission are subject to Chapter

171 conflict of interest provisions. Accordingly, the ability of such officials to discuss or vote on an item would be limited by these laws if the official has a conflict of interest on the issue.

3. Do conflict of interest laws apply to members of purely advisory committees that are established by the Town?

No, Chapter 171 conflict of interest provisions apply to any officer who exercises responsibilities beyond those that are advisory in nature. Whether an officer exercises such responsibilities depends upon the authority vested in him or her by law and not necessarily the title of the board or commission to which he or she belongs. For most Flower Mound board and commissions, you should assume that your duties are more than advisory in nature.

4. What types of issues are covered by Texas conflict of interest laws?

Texas conflict of interest statutes do not address every conceivable conflict that may arise for a local official. In fact, Chapter 171 conflict laws are generally financial in nature and only cover two types of conflicts of interest: (1) Business Entity conflicts: Conflicts due to a local official's substantial financial interest in a "business entity" that has an issue before his or her governmental unit; or (2) Real Property conflicts: Conflicts due to a local official's substantial financial interest in "real property" that would be affected by his or her action on Town issues. If an item is being considered by a local official that does not involve a business entity or real property, then Chapter 171 conflict of interest laws would not be applicable.

5. What is the definition of a "business entity" for purposes of the conflict of interest laws?

For purposes of Texas conflict of interest laws, a "business entity" means: sole proprietorships, partnerships, firms, corporations, holding companies, joint-stock companies, receiverships, trusts, and any other entity recognized by law as a business entity. Governmental entities such as cities or school districts are not considered business entities. Accordingly, if the issue before a Town board or commission involves another governmental entity, an official's relationship with that entity would not subject that official to conflict of interest laws; however, an economic development corporation is a business entity, so an official with a substantial interest in the corporation would have to comply with Chapter 171.

6. What is considered a “substantial interest” in a business entity (such that it would amount to a potential conflict of interest)?

There are four ways that a person could be deemed to have a “substantial interest” in a business entity that would raise a potential conflict of interest. A person has a substantial interest in a business entity if the person has a(n):

- (1) Stock interest: If the official owns 10 percent (10%) or more of the total voting stock or shares of the business entity;
- (2) Other ownership interest: If the official owns either 10 percent (10%) or more, or \$15,000 or more, of the fair market value of the business entity;
- (3) Income interest: If the official received more than 10 percent (10%) of his or her gross income for the previous year from the business entity;
- (4) Close family member with any of the above interests: If a close relative of the local official has any of the above types of interest in a business entity. A local official is considered to have the same interest in a business entity that his or her close relatives have in that business entity. In this context, close relatives of an official would include persons who are related to the official within the first degree by consanguinity (blood) or affinity (marriage). Such relatives would include an official’s father, father-in-law, mother, mother-in-law, daughter, daughter-in-law, son, son-in-law and the spouse of the official.

7. Is the fact that a local official is employed by a business entity sufficient to create a potential conflict?

Being employed by a business entity will prevent a local official from discussing or voting on any Town contract or other matter involving that business, provided more than 10 percent (10%) of the official’s previous year’s income came from his or her employment with that business.

8. What is the test for conflict of interest regarding a business entity?

State law provides a two-part test for ascertaining whether a local official has a conflict of interest regarding a business entity that would prevent the official from participating in a vote or discussion on that item. To determine whether a conflict exists that would prevent that official’s participation, one should follow the following two-step analysis:

Step one (substantial interest analysis): First, the official must determine if he or she received more than 10 percent (10%) of his or her gross income in the previous year from that business entity or if he or she owns 10 percent (10%) or more of the voting

stock or shares of the business entity or has some other substantial ownership interest in the business entity. If the official has such an interest or a close relative of the official has such an interest, the official must consider step two, the second part of the test, for determining if a conflict of interest exists.

Step two (special economic effect analysis): The official must determine whether the action that the board or commission is considering would have a special economic effect on the business entity that is distinguishable from its general effect on the public.

If it is determined that the official has a substantial interest in the business entity and it is likely that the action would have a special economic effect on the business entity that is distinguishable from its effect on the general public, a conflict of interest exists. If a conflict of interest exists, the official is prevented from discussing or voting on an issue involving that business entity.

9. May an indirect benefit from a contract with a business constitute a possible conflict of interest?

In certain situations, an indirect benefit that a local official may receive regarding a business entity may be sufficient to constitute a conflict of interest. For example, the Dallas Court of Appeals concluded that the definition of “substantial interest” did not distinguish between funds received directly from a business entity and funds received indirectly. Whether a particular interest was a “substantial interest” was a question of fact.

10. What is considered a “substantial interest” in real property (such that it would amount to a potential conflict of interest)?

There are two ways that a person could be deemed to have a “substantial interest” in “real property” (such that it would amount to a potential conflict of interest). A person has a substantial interest in real property if he or she has:

- (1) A \$2,500 ownership interest in the real property: If the official has a legal or equitable interest in real property worth \$2,500 or more, or
- (2) A close family member with a \$2,500 ownership interest in the real property: If a close relative of the local official has a legal or equitable interest in real property worth \$2,500 or more. An official is considered to have the same interest in a piece of real property that his or her close relatives have in the real property. In this context, close relatives of an official would include persons who are related to the official within the first degree by consanguinity (blood) or affinity (marriage). Such relatives would include an official’s father, father-in-law, mother, mother-in-law, daughter, daughter-in-law, son, son-in-law and the spouse of the official.

11. What is the test for conflict of interest regarding real property?

State law provides a two-part test for ascertaining whether a local official has a conflict of interest regarding real property that would prevent the official from participating on that item. To determine whether a conflict exists that would prevent that official's participation, one should follow the following two-step analysis:

- (1) **Substantial Interest Analysis:** The official must determine if the official has a legal or equitable interest in real property worth \$2,500 or more. If the official has such an interest or a close relative of the official has such an interest, the official must consider the second part of the test for determining if a conflict of interest exists.
- (2) **Special Economic Effect Analysis:** The official must determine whether the action that the local unit is considering would have a special economic effect on the value of the property that is distinguishable from its general effect on the public.

If it is determined that the official has a substantial interest in the real property and it is likely the action would have a special economic effect that is distinguishable from its effect on the general public, a conflict of interest would exist. If a conflict of interest exists, the official is prevented from discussing or voting on an issue involving that business entity.

The fact that an action would affect property physically close to an official's own property does not in itself establish a conflict of interest that would prevent an official from voting on that item. The official must consider whether the proposed governmental action would have a special economic effect on the value of his or her own property that is distinguishable from its effect on the general public. For example, if a zoning, variance or platting request would have a special economic effect on a city official's own property or the real property of a close relative of the official, the official could not participate in the discussion or vote on that matter.

12. Might the part-time or summer job of an official's child create a conflict of interest?

If a local official's child worked at a job that constituted more than 10 percent (10%) of the child's income for the previous year, that might create a potential conflict of interest for the parent. If the child had such an interest, the parent could not vote on or discuss local governmental business that would have a special economic effect on the child's employer.

13. May a local official discuss or vote on an item if the effect of the vote on the official's business or property interest is no different than its effect on the general public?

Yes, an official may discuss and vote on an item if there is no distinguishable difference between the item's effect on the local official and its effect on the general public. For example, the Town may be considering the adoption of a setback requirement that would apply to all residential lots. Such a requirement arguably would not impact a Town official's property in a more significant manner than it would impact the property of other members of the general public. In such a situation, the official could fully participate in the discussion and vote. Of course, if the official's property would be specially enhanced by a change in the setback requirement, then it would be more likely to present a conflict of interest issue for the official.

14. What actions must a local official take if the official has a conflict of interest under Chapter 171?

If a local official has a conflict of interest under the two-part test of Chapter 171, the official must take three actions:

- (1) File an affidavit: The official must file an affidavit with the Town Secretary stating the nature and extent of the official's interest in the matter. This affidavit must be filed before any vote or decision on the matter.
- (2) Abstain from discussion on the item: The official must abstain from all discussions or other proceedings regarding the item; and
- (3) Abstain from voting on the item: The official must not vote on the item.

15. May a local official deliberate about an issue with which the official has a conflict of interest if the official abstains from voting on the issue?

No, a local official may not discuss an issue with which he or she has a conflict of interest even if he or she abstains from voting on the item. If a conflict of interest exists, the official must file the required affidavit and both abstain from discussing the matter and abstain from voting on the item.

16. What may a local entity do if a majority of the members of the governmental body have a conflict of interest regarding an item to be considered?

Chapter 171 conflict of interest laws do not prevent discussion or voting on the item if a majority of the members of a board or commission have similar conflicts of interest on the same item; however, prior to any deliberations on the matter, each of the members of the board or commission with a conflict must have filed the required affidavit noting their interest in the item.

17. May the Town provide further conflict of interest limitations on its officials and employees?

Yes, the Town is permitted under state law to provide further and more restrictive conflict of interest limitations on its officials and employees. Such restrictions may be contained in an ordinance, policy or within the Town Charter. The Town has adopted such an ordinance and it is found in Chapter 2 of the Town's Code of Ordinances.

18. Must a local official be removed from office if the official violates the conflict of interest laws?

State law does not provide for an automatic removal of a local official from office due to an alleged or proven violation of a conflict of interest law; however, if such a violation is proven, it may be used as the basis for a removal of a member for misconduct under state law or other statutory or ordinance or charter criteria that allow a local official to be removed from office.

19. May a person be charged with a crime if the official violates the conflict of interest laws?

Yes, Chapter 171 of the Local Government Code provides four situations in which a public official may be prosecuted for his or her actions or inaction regarding a conflict of interest. Specifically, a local official can be prosecuted for:

- (1) Failure to File an Affidavit Noting a Conflict: Failing to file an affidavit with the official record keeper noting the official's substantial interest in an item if such a filing is required by Local Government Code § 171.004;

- (2) Participating in Discussions regarding an Item for which there is a Conflict: Discussing or otherwise participating on an item if such participation is prohibited under Local Government Code § 171.004 due to a conflict of interest on that item;
- (3) Serving as a Surety for Certain Businesses: Acting as a surety for any business entity that has work, business or a contract of any amount with the local entity; or
- (4) Serving as a Surety for Local Official Bonds: Acting as a surety on any official bond that is required for an official of a governmental body of the local entity.

Violation of any of the above four items can be prosecuted as a class A misdemeanor and is punishable by a fine not to exceed \$4,000 and/or up to one year in jail. Whether to prosecute an alleged violation of the conflict of interest laws is subject to the prosecutorial discretion of the Denton County Criminal District Attorney's Office. The Texas Attorney General does not have original jurisdiction to prosecute violations of conflict of interest laws by public officials.

Town of Flower Mound Code of Ethics

The Town's Ethics Ordinance is contained in Article VIII of Chapter 2 of the Town's Code of Ordinances. The operative provisions of the ethics ordinance are below:

No officer, official or employee of the town shall:

- (1) Accept any gift or economic benefit of more than \$20.00 in value from any person or entity which gift or economic benefit might reasonably tend to influence such officer, official or employee in the discharge of official duties, or grant in the discharge of official duties any improper gift, economic benefit, service or thing of value; however, the provisions of this section shall not apply to any political contribution made pursuant to the Texas Election Code.
- (2) Use his official position to solicit or secure special privileges or exemptions for himself or others.
- (3) Directly or indirectly disclose or use any information gained solely by reason of his official position or employment for his own personal gain or benefit or for the private interest of others.
- (4) Transact any business on behalf of the town in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest. If such a circumstance should arise, then in the case of an officer or official, he shall make known such interest and abstain from voting on the matter, or in the case of an employee, he shall turn the matter over to his supervisor for reassignment, state the reasons for doing so and have nothing further to do with the matter involved.

(5) Engage in any outside activities which will conflict with his assigned duties in the employment of the town, or which his employment with the town will give him an advantage over others engaged in a similar business, vocation or activity.

(6) Accept other employment or engage in outside activities incompatible with the full and proper discharge of his duties and responsibilities with the town, or which might impair his independent judgment in the performance of his public duties.

(7) Receive any fee or compensation for his services as an officer, official or employee of the town from any source other than the town, except as may otherwise be provided by law. This shall not prohibit an officer, official or employee from performing the same or other services that he performs for the town for a private organization if there is no conflict with his town duties and responsibilities.

(8) Represent, directly or indirectly, or appear on behalf of the private interests of others before any agency, board, commission, authority or committee of the town, or accept any retainer or compensation that is contingent upon a specific action being taken by the town or any of its agencies, boards, commissions, authorities or committees, unless such officer, official or employee of the town has made full disclosure of such representation, retainer or compensation. For purposes of this subsection, the term "full disclosure" shall mean:

a. The filing of an affidavit with the town secretary describing such representation, retainer or compensation;

b. Disclosure, either orally or in writing, to the other members of the town agency, board, commission, authority or committee;

c. Refraining from any other discussion of the matter with other members of the town agency, board, commission, authority or committee; and

d. Refraining from voting on or participating in the consideration of such matter by the town agency, board, commission, authority or committee.

(9) Use the prestige of his position on behalf of any political party or engage in any political activity which does not maintain the nonpartisan policy of the town; provided, however, that all employees are encouraged to register and vote as they may choose in all local, state and national elections.

(10) Knowingly perform or refuse to perform any act in order to deliberately hinder the execution and implementation of any town ordinances, rules or regulations or the achievement of official town programs;

(11) Have a substantial interest, direct or indirect, in any contract with the town or a substantial interest, direct or indirect, in the sale of the town of any land, or rights or interest in any land, materials, supplies or service;

(12) Participate in a vote or decision on any matter in which the officer, official or employee has a direct or indirect substantial interest or in which a relative of the officer, official or employee has a direct or indirect substantial interest;

(13) Grant any special consideration, treatment or advantage to any individual, business organization or group beyond that which is normally available to every other individual, business organization or group. This shall not prevent the granting of fringe benefits to town employees as an element of their employment or as an added incentive to the securing or retention of employees;

(14) Knowingly disclose information deemed confidential by law; or

(15) Participate 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, official, employee or a relative of the officer, official or employee 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. Further, any officer, official or employee who has any such interest in property shall be legally disqualified from participating in any vote or decision relative to the comprehensive master plan amendment or change in zoning classification.

1. Is the Town's Code of Ethics more strict than state law?

Yes, the Town's Code of Ethics is substantially stricter than Texas state law. The \$20 limitation referenced in item (1), above, generally means that if you receive any economic benefit of at least \$20, you are prohibited from discussing, deliberating or voting on the matter. For example, if you receive a \$25 stock dividend from a utility company, you cannot participate in any way with a matter involving that utility company. One of the key issues to remember is that this provision of the Code of Ethics (§ 2-415(1)) does not contain a time limitation, as do other provisions of the Code of Ethics. Consequently, if you have received more than \$20 from stock (such as a dividend), former employer, etc., even if that were several years ago, you still have a conflict of interest.

Please review your investments and other sources of income, including past investments and sources of income. Again, if you receive (or have received) at least \$20 in income from one source, you are prohibited from any participation in any matter involving that source of income.

2. What if I have signed a natural gas lease—does that mean I cannot participate in anything involving natural gas issues?

No. If you signed a gas lease with Company X, you cannot participate in any way with an issue involving Company X; however, if you signed a lease with Company Y, you can still participate in matters involving Company X.

3. If I have a question about whether I have a conflict of interest, what should I do?

If you have a question whether you have a conflict of interest or are unsure if one even exists, please contact the Town Attorney's Office to discuss the issue. You will receive a written opinion on the matter that should answer your questions. Further, if it is determined that there is conflict of interest under either state law or the Town's Code of Ethics, as noted in response to Question No. 14, above, the same advice applies—file an affidavit with the Town Secretary's Office, do not discuss the item with others, and you must not vote on the item or participate in any deliberation about the item. Further, you must leave the meeting when the item is being discussed by the remaining members of the board or commission.

4. What is the penalty for violation of the Town's Code of Ethics?

Unlike violations of Chapter 171 of the Texas Local Government Code (which are a class A misdemeanor, as referenced in Question No. 19, above), a violation of the Town's Code of Ethics is a class C misdemeanor (the same penalty as a traffic offense), punishable only by a fine not exceeding \$500.

5. What is a good, basic checklist for me, as a public official, to consider as a protective strategy to ensure ethical compliance?

While you should consult with the Town Attorney about specific ethical issues, each member of any Town board or commission 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 the Town's ethics code?
3. Do I engage in a business in any way related to issues which may come before me as a member of the board or commission?
4. Could my business potentially benefit or be harmed by a decision of the board or commission?
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 board or commission:

- 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 board or commission?
 8. Am I related to or in business with another Town 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?

Unfortunately, most ethical issues faced by local governmental officials tend to be somewhat “gray” and rarely is it clear that a conflict indeed exists. Nevertheless, the safer course always is to conclude there is a conflict if indeed reasonable minds may differ. Even Attorney General Morales was able to suggest this conclusion as he wrote: “it might, indeed, be advisable for a member to comply with the affidavit and abstention requirements if he is in doubt whether his failure to do so will place him in violation.” With a backdrop of criminal sanctions, attention should always be paid to fact situations in any context that raise ethical concerns.

One other issue that arises frequently is the concern about the possible appearance of impropriety where a conflict of interest does not exist but there might be a perception of something untoward in some people’s minds. It is usually the recommendation of the Town Attorney’s Office that if an official is concerned about those perceptions, then the official may wish to consider complying with the affidavit and abstention requirements out of an abundance of caution. Of course, it is the official’s decision; however, in the absence of a clear conflict of interest, many officials desire to eliminate any questions about a potential conflict or the perception of a conflict.