

Excerpt from

2019 Handbook for Mayors and Councilmembers

Chapter Eight: Conflicts of Interest

Mayors and councilmembers are expected to avoid involvements that put their own personal interests at cross purposes with those of the public. In most cases, good judgment is enough to keep city officials within the bounds of propriety. There are, however, state laws governing the behavior of city officials.

At least three situations can impair the ability of mayors or councilmembers to properly perform their duties. All three involve conflicts of interest in which a member of the city council is placed in the position of owing loyalty to the interests of the city on one hand, and to some other interest on the other.

The first situation occurs when a councilmember occupies two or more public offices at the same time. The second exists when the city council votes to take an action that will have a beneficial effect on a business or property in which a councilmember has a major interest. And the third exists in cases of nepotism, where hiring decisions are made on the basis of relationship. Each of these situations is described below.

Dual Office-Holding

Two or More Civil Offices

Mayors and councilmembers are prohibited from holding more than one public office at the same time if both are “offices of emolument.” An emolument is a benefit that is received as compensation for services and includes salaries, fees of office, or other

compensation—not including the reimbursement of actual expenses.

Therefore, a mayor or councilmember who receives a salary, fees for attending council meetings, or any other emoluments from the city, may not simultaneously serve as a district judge, state senator or representative, county clerk, or in any other local or state office of emolument. The only exceptions to this prohibition are found in Article XVI of the Texas Constitution, which allows certain state officers and employees to hold municipal offices of emolument and which permits a person holding an office of emolument to also serve as a justice of the peace, county commissioner, notary public, as an officer of a soil and water conservation district, or in other specific offices.

Incompatibility

Secondly, with respect to dual civil offices, mayors and councilmembers are prohibited from holding a second public office having duties and loyalties incompatible with those that must be performed as an officer of the city. This rule—which applies to all public offices, whether paid or unpaid—heeds the mandate that no person can serve two masters; full allegiance is required to one or the other.

The general rule regarding incompatible offices was reviewed in *Thomas v. Abernathy County Line I.S.D.*, in which the Texas Supreme Court held that the offices of city councilmember and school board member were incompatible

because if the same person could be a school trustee and a member of the city council or board of aldermen at the same time, school policies, in many important respects, would be subject to direction of the council or aldermen instead of the trustees.

The incompatibility doctrine also prohibits the council from appointing one of its own members to a public office or employing the member as a public employee. A mayor, for example, could not simultaneously serve as a police officer for the city.

Though it may be difficult at times to determine whether two offices or positions are incompatible, a misjudgment could be costly. The courts have held that when an individual who holds an office accepts and is sworn into a second office that conflicts with the first, the individual is deemed to have automatically resigned from the first office.

City Actions that Benefit Mayors and Councilmembers

City councils everywhere routinely make decisions on purchases, rezoning, utility extensions, road construction projects, and other matters that benefit various private interests. Because of the broad scope of the council's powers, it is reasonable to expect that some of its decisions will directly or indirectly impact the individual members of the council making such decisions.

Anticipating that potential conflicts of interest will inevitably arise at the local level, while acknowledging the practical impossibility of flatly prohibiting such conflicts, the Texas Legislature has enacted at least three statutory schemes that require the public disclosure of

conflicts between the public interest and a councilmember's private interests (Section 171.001 et seq., Section 176.001 et seq., Local Government Code; and Section 553.002 et seq., Government Code).

The purpose of chapter 171, the conflicts of interest statute, is to prevent councilmembers and other local officials from using their positions for hidden personal gain. The law requires the filing of an affidavit by any councilmember whose private financial interests—or those of relatives— would be affected by an action of the council. Whenever any contract, zoning decision, or other matter is pending before the council, each councilmember must take the following steps:

- (a) Examine the pending matter and determine whether the councilmember or a related person has a substantial interest in the business or property that would be beneficially affected by a decision of the city council on the matter.

A person has a substantial interest in a business entity if:

- 1) the person owns 10 percent or more of the voting stock or shares or of the fair market value of the business entity or owns \$15,000 or more of 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.

A person 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.

Additionally, a substantial interest of a person related in the first degree by either affinity or consanguinity to the local public official is a “substantial interest” that the official must disclose.

(b) If the answer to (a) is “yes,” the councilmember must file an affidavit disclosing the nature of the interest in the matter and/or the nature of the substantial interest of a related person in such 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.

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

(c) After the councilmember files a disclosure affidavit, he or she must abstain from participating in the discussion of the matter and abstain from voting on it. However, if a local public official is required to file the affidavit and does file the affidavit, that official is not required to abstain in the

matter if a majority of the governing body are also required to file and do file affidavits on the same official action.

Pursuant to this statute, the city can purchase goods or services from a business in which a councilmember has a substantial interest if the councilmember files a disclosure affidavit and then abstains from discussing and voting on the decision regarding the purchase.

The city council must take a separate vote on any budget item specifically dedicated to a contract with an entity in which a member of the governing body has a substantial interest, and the affected member must abstain from that separate vote. The member who has complied in abstaining in such vote may vote on a final budget only after the matter in which there was an interest has been resolved.

An officer who knowingly violates the affidavit or abstention requirement commits a Class A misdemeanor which is punishable by confinement in jail for up to one year and a fine up to \$4,000.

Local Government Code Chapter 176, a second conflicts disclosure statute, requires that mayors, councilmembers, and certain other executive city officers or agents file a “conflicts disclosure statement” with a city’s records administrator within seven days of becoming aware of any of the following situations:

- A city officer or the officer’s family member has an employment or business relationship that results in taxable income of more than \$2,500 with a person who has contracted with the city or with whom the city is considering doing business.

- A city officer or the officer’s family member receives and accepts one or more gifts with an aggregate value of \$100 in the preceding 12 months from a person who conducts business or is being considered for business with the officer’s city.
- A city officer has a family relationship with a person who conducts business or is being considered for business with the officer’s city.

The chapter also requires a vendor who wishes to conduct business or be considered for business with a city to file a “conflict of interest questionnaire” if the vendor has a business relationship with the city and an employment or other relationship with an officer or officer’s family member, gives a gift to either, or has a family relationship with a city officer.

An officer who knowingly fails to file the statement commits either a Class A, B, or C misdemeanor, depending on the amount of the contract.

A third conflicts disclosure statute, Chapter 553 of the Government Code, prevents councilmembers and other local officials from using their positions for hidden personal gain related to the city’s purchase or condemnation of property in which the city official has a legal or equitable interest.

Whenever a city is deciding whether to purchase or condemn a piece of property, the individual officer should determine whether they have a legal or equitable interest in property that is to be purchased or condemned. If the individual does have a legal or equitable interest in property in such a situation, then the individual needs to file an affidavit within 10 days before the date on

which the property is to be acquired by purchase or condemnation. The affidavit is filed with the county clerk of the county in which the official resides as well as the county clerk of each county in which the property is located.

The affidavit must include: (1) the name of the public servant; (2) the public servant’s office, public title, or job designation; (3) a full description of the property; (4) a full description of the nature, type, and amount of interest in the property, including the percentage of ownership interest; (5) the date the public servant acquired an interest in the property; (6) the following verification: “I swear that the information in this affidavit is personally known by me to be correct and contains the information required by Section 553.002, Government Code;” and (7) an acknowledgement of the same type required for recording a deed in the deed records of the county.

A public official who violates the affidavit requirement after having notice of the purchase or condemnation commits a Class A misdemeanor, which is punishable by up to one year in jail and a fine up to \$4,000.

Nepotism

“Nepotism” is the award of employment or appointment on the basis of kinship. The practice is contrary to sound public policy, which is why prohibitions against nepotism are common in all states, including Texas.

The Texas nepotism statute, chapter 573 of the Government Code, forbids the city council from hiring any person who is related to a councilmember within the second degree by affinity or within the third degree by

consanguinity. This prohibition does not apply to a city with a population of 200 or less, or to relatives who were continuously employed by the city for: (1) at least 30 days, if the councilmember is appointed; or (2) at least six months, if the councilmember is elected. When a person is allowed to continue employment with the city because the person has been continuously employed for the requisite period of time, the city council member who is related shall not participate in the deliberation or voting on matters concerning employment if such action applies only to the particular person and is not taken with respect to a bona fide class or category of employees.

The nepotism statute does not apply to unpaid positions.

Since “affinity” and “consanguinity” are the controlling factors in determining nepotism, both terms need to be clearly understood. Affinity is kinship by marriage, as between a husband and wife, or between the husband and the blood relatives of the wife (or vice versa).

Consanguinity is kinship by blood, as between a mother and child or sister and brother.

Two persons are related to each other by affinity if they are married to each other or the spouse of one of the persons is related by consanguinity to the other person. The following relatives of a public official would fall within the prohibited first or second degree of affinity.

Relatives related within the first degree of affinity include a public official’s husband, wife, father-in-law, mother-in-law, sons-in-law, daughters-in-law, stepsons, and stepdaughters.

Relatives related within the second degree of affinity include a public official’s sisters-in-law (brother’s spouse or spouse’s sister), brothers-in-law (sister’s spouse or spouse’s brother), spouse’s grandmothers, spouse’s grandfathers, spouse’s granddaughters, and spouse’s grandsons.

Termination of a marriage by divorce or the death of a spouse terminates relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is treated as continuing to exist as long as a child of the marriage is living.

Two persons are related to each other by consanguinity if one is a descendant of the other or if they share a common ancestor.

Purchasing

Government Code Section 2252.908 provides that, with certain exceptions: (1) a city is prohibited from entering into a contract with a business entity unless the business entity submits a disclosure of interested parties (i.e., discloses a person who has a controlling interest in the business or who actively participates in facilitating the contract for the business) if the contract: (a) requires an action or vote by the city council before the contract may be signed; or (b) the contract has a value of at least \$1 million or (c) is for services that would require a person to register as a lobbyist; (2) the disclosure must be on a form prescribed by the Texas Ethics Commission; and (3) a city must, not later than 30 days after receiving a disclosure, acknowledge receipt of the disclosure with the Texas Ethics Commission.