

CITY OF GRAPEVINE, TEXAS  
BUILDING BOARD OF APPEALS MEETING AGENDA  
MONDAY, OCTOBER 14, 2024

GRAPEVINE CITY HALL, SECOND FLOOR  
200 SOUTH MAIN STREET  
GRAPEVINE, TEXAS 76051

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6:00 p.m. Dinner/Workshop - Planning and Zoning Commission Conference Room  
Public Hearing – City Council Chambers

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**WORKSHOP: 6:00 p.m.** – Planning and Zoning Conference Room

**CALL TO ORDER**

1. City Attorney to conduct briefing of legal aspects of Building Board of Appeals.

**PUBLIC HEARING:** *Immediately Following the Workshop Session* – City Council Chambers

2. Call to Order
3. Roll Call
4. Oath of Office
5. Election of Officers

**CITIZEN COMMENTS**

6. Any person who is not scheduled on the agenda may address the Commission under Citizen Comments or on any other agenda item by completing a Citizen Appearance Request form with the staff. A member of the public may address the Commission regarding an item on the agenda either before or during the Commission's consideration of the item, upon being recognized by the Chairman or upon the consent of the Commission. In accordance with the Texas Open Meetings Act, the Commission is restricted in discussing or taking action during Citizen Comments.

**NEW BUSINESS**

7. Building Board of Appeals to consider the 2025 Meeting Agenda Schedule and take any necessary action.

8. Building Board of Appeals to consider the minutes of the August 14, 2023, meeting and take any necessary action.

### ADJOURNMENT

In accordance with the Open Meetings Law, Texas Government Code, Chapter 551, I hereby certify that the above agenda was posted on the official bulletin boards at Grapevine City Hall, 200 South Main Street and on the City's website on October 11, 2024, by 5:00 p.m.

  
LARRY GRAY  
BUILDING OFFICIAL

*If you plan to attend this public hearing and you have a disability that requires special arrangements at the meeting, please contact the office of Building Services at (817) 410-3158 at least 24 hours in advance. Reasonable accommodations will be made to assist your needs.*

Boards and Commissions Handbook



CITY OF GRAPEVINE  
2024 - 2025

# Boards and Commissions Handbook

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*\*\*\*For simplification, the term "Boards" refers to both boards and commissions.*

## **CHAPTER I. DEFINITIONS AND LIABILITY**

### **A. BOARDS AND COMMISSIONS DEFINED**

The work done by citizens serving on boards and commissions is a vital part of the work of Grapevine city government. Grapevine has two types of boards and commissions: advisory and decision making. Additionally, there are boards whose membership is appointed by the City Council, but that are separate legal entities.

### **B. ADVISORY BOARDS AND COMMISSIONS**

Advisory boards play a very important role in city government by providing the City Council with creative ideas, feedback from the community, and by serving as a sounding board for proposed public policy.

It is important to remember that the role of advisory boards is not to set public policy, but to provide advice and information to the City Council and City staff. The following are those boards and commissions that serve in an advisory capacity:

- Animal Shelter Advisory Committee
- Convention & Visitors Bureau Board
- Golf Course Advisory Board
- Grapevine Heritage Foundation Advisory Board
- Library Board
- Metroport Teen Court Advisory Board
- Parks and Recreation Board
- Senior Citizens Advisory Board

All members of these boards are required to take the Oath of Office prior to taking their seat. These boards are also subject to the Open Meetings Act, the Public Information Act, and ethics laws.

### **C. DECISION MAKING BOARDS AND COMMISSIONS**

Decision making boards are governed by State law. Decision making boards set or enforce public policy and are potentially subject to review by the courts. Decision making boards also advise the City Council on public policy. The ordinances or resolutions creating decision making boards often require board members to have expertise in certain areas.

Members serving on decision making boards will be required to take an Oath of Office and sign a Statement of Appointed Officer prior to taking their seat. All members are subject to the Open Meetings Act, the Public Information Act, and ethics laws.

The ordinances or resolutions creating decision making boards often require board members to have expertise in certain areas. Decision making boards also advise the City Council on public policy. The following is a list of decision-making boards and commissions:

- Board of Zoning Adjustment
- Building Board of Appeals
- Historic Preservation Commission
- Planning and Zoning Commission

#### **D. SEPARATE LEGAL ENTITIES - STATUTORY BOARDS AND COMMISSIONS**

There are boards that are separate entities, corporations, or political bodies from the City, even though the City Council may appoint the membership to these boards. They are usually established under the provisions of State statute which will set forth the functions, duties, responsibilities and limitations of the corporation or political body.

The following are those boards and commissions that are separate entities from the City, but whose membership is appointed by the City Council:

- Grapevine 4B Economic Development Corporation Board
- Housing Authority Board of Commissioners
- Industrial Development Corporation
- Metroport Teen Court Advisory Board

The members appointed to these boards oversee the operation of an organization similar to the way the board of directors would a corporation. The City of Grapevine has no authority over the members of the Housing Authority Board of Commissioners and has only statutory authority over the Industrial Development Corporation. The only regulation the City has is the appointment process and, therefore, the City has no liability for their actions. However, each member is required to take an Oath of Office and a Statement of Appointed Officer to be filed with the City of Grapevine. City staff and the State statute establishing these organizations, the Articles of Incorporation and the bylaws of the organization will provide a great deal of information.

Members serving on boards will be required to take an Oath of Office prior to taking their seat. All members are subject to the Open Meetings Act, the Public Information Act, and ethics laws.

#### **E. LEGAL LIABILITY**

Members of boards and commissions are carrying out duties and responsibilities for and on behalf of the City of Grapevine. The City itself is governed by State and federal law and City ordinances. Actions of boards and commissions on occasion can result in possible liability for the City and its agents.

Members of boards and commissions are considered agents of the City and their conduct and actions should be above reproach and their actions shall conform with the laws governing their respective Board. Generally speaking, all boards and commissions are required to follow the Texas Open Meetings Act, Public Records Act, conflict of interest statutes and the Tort Claim Act. The City Attorney and the City administration

will apprise you of the requirements under these laws and you should inquire of the City Attorney and City administration if you have any questions or concerns.

## CHAPTER II.

### BOARD AND COMMISSION APPOINTMENT PROCESS

#### A. APPOINTMENT PROCESS

The Grapevine City Council makes all of the appointments to Grapevine's boards and commissions during the summer. The City Secretary's Office will accept applications during late spring.

In April, the available positions along with the Application for Appointment will be posted on the City's Boards and Commissions webpage.

Citizens interested in being appointed should turn in completed applications to the City Secretary's Office during the application acceptance period. This date will be posted on the website in April, as well.

The terms for all boards are two years, with the exception of the Planning and Zoning Commission whose members serve for three-year terms. Some boards also have alternate positions that serve for one-year. With the exception of the alternate to the Board of Zoning Adjustment who serves for two years.

Once their term is up, members must submit a new application to be considered for reappointment.

#### B. NOTICE OF APPOINTMENT

After the City Council appoints a person to serve as a member of a board, the City Secretary will notify the appointee, in writing, of the appointment.

#### C. ELIGIBILITY AND QUALIFICATIONS

The Grapevine City Council seeks out the best qualified citizens to serve on boards. The qualifications required to serve on a particular board are determined by Grapevine City ordinance, resolution or by the State statute establishing the board or commission.

Beyond residency and being a qualified registered voter, many of the boards or commissions do not have specific eligibility requirements, leaving the membership qualifications to the discretion of the City Council. Appointments to boards and commissions having eligibility requirements must be made in accordance with the governing City ordinance, resolution or State statute.

No one person will be selected for more than one board at a time with the exception of appointments to special boards or commissions related to their current position.

In order to allow greater participation in City government, Board appointments are limited to one member per household. Spouses will not be appointed to serve on boards, either the same board or a different board.

The City's Charter also addresses the appointment of family members of elected officers or City staff. If you believe there may be a conflict, contact the board staff liaison or the City Secretary's Office for assistance.

**D. OATH OF OFFICE/STATEMENT OF APPOINTED OFFICER**

Everyone appointed to a board by the Council will take an Oath of Office that will be filed in the City Secretary's Office.

As previously mentioned members of the Board of Zoning Adjustment, Building Board of Appeals, Historic Preservation Commission and Planning and Zoning Commission shall also sign the Statement of Appointed Officer.

The City Staff members who oversee the Boards will determine when the Oaths and Statement of Appointed Official will be signed.

The Oath of Office and Statement of Appointed Officer can be administered by the City Secretary or a Notary Public.

## CHAPTER III.

### RESPONSIBILITIES OF BOARD AND COMMISSION MEMBERS

#### A. CONFLICTS OF INTEREST

Texas Conflicts of Interest Law, V.T.C.A. Local Government Code Section 171.001 et seq. - Regulation of Conflicts of Interest of Officers of Municipalities, Counties, and Certain Other Local Governments. Under this Chapter, if a local official or his/her close relative stands to gain a financial benefit from a matter pending before a public agency upon which the official serves, the person must publicly disclose his/her interest in such matters and then abstain from voting on it. Chapter 171 is attached as Appendix A for your review. Consult with City Staff if you believe there may be a conflict.

#### B. TEXAS OPEN MEETINGS ACT

Texas Government Code Chapter 551.001 et seq is commonly referred to as Texas Open Meetings Act. This Chapter generally requires that every meeting of a governmental body be open to the public and lists some exceptions to the requirement.

##### 1. Definitions

- a. "Open" means open to the public.
- b. "Meeting" is defined as a means of deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action. This does not include the gathering of a quorum at a social function totally unrelated to the public business that is conducted by the body.
- c. "Governmental body" means a board, commission, department, committee or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members. It also refers to a municipal governing body in the State.
- d. "Quorum" means a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body.
- e. "Deliberation" means a verbal exchange during a meeting between a quorum of governmental body members, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.

##### 2. Closed Meetings

Texas Government Code Chapter 551.071-551.076, Exceptions To Requirement that Meetings Be Open, and 551.144 refers to Closed Meetings; Offense; Penalty.

Closed meetings are allowed only to discuss specific topics are not available for all boards. City Staff will set the agendas and will determine the needs for a closed meeting.

### 3. Quorums

For most boards, a quorum is a majority of the members of the Board. However, the quorum requirements for some boards are different and can be found in their respective bylaws or legislative document that created the board. Staff will advise of the proper quorum for each board.

## C. MEETING ATTENDANCE

***It is important for members to keep in mind that attendance is required at all board or commission meetings.***

The staff secretary that keeps the minutes for your board will also be keeping an attendance record. This record will be provided to the City Council during the appointment process and will be taken into consideration as Council evaluates the candidates.

A poor attendance record can also result in a member's removal from their appointed position.

## D. WORKING RELATIONSHIP WITH CITY STAFF

Each board or commission member is encouraged to communicate openly with City staff. Suggestions, opportunities, and constructive criticism are necessary for a proper relationship with the staff. However, each board or commission member is strongly encouraged to communicate with the appropriate department head responsible for that board.

Prior to every board meeting, each member will receive an agenda and associated back-up materials. It is expected that every member will be familiar with the materials and issues presented therein prior to the beginning of the meeting.

## E. REPORTING TO CITY COUNCIL

The City Council is highly dependent on each board to make recommendations and offer possible solutions to City projects and suggest possible opportunities that may benefit the City and its citizens.

The Mayor appoints a member of the City Council to serve as a liaison to each Board. The liaisons regularly attend the meetings and keep in communication with City staff regarding projects and issues related to the Board.

## CHAPTER IV. MEETINGS

### A. BOARD CHAIRMAN

The Mayor appoints the Chairmen to the Convention and Visitors Bureau Advisory Board, Heritage Foundation Advisory Board, The Parks and Recreation Board and the Senior Citizens Advisory Board. The other boards will elect their chairman, if applicable, during a public meeting.

The function of the chairman is to provide leadership to the group. Although some boards have specific duties for the Chairman, it is vital that this person can

1. Insure that the meeting is conducted in accordance with established rules.
2. Maintain order and bring the group to a conclusion on the matters before it.

Staff will advise the Chairs of their specific duties and will provide guidance on running meetings.

### B. OTHER OFFICERS

Besides the Chair, most of the Boards have other officer positions, which can vary by board. The boards will vote on these officers during a public meeting. Staff will advise these offices of their respective duties as described in the Boards governing documents.

### C. AGENDAS

The agenda will be prepared ahead of time by staff and copies given to all board or commission members ahead of time.

Normally, the agenda will be prepared by the secretary of the department responsible for each particular board.

Boards are subject to the Open Meetings Law which require that all agendas be posted 72 hours prior to the start of the meeting on the boards at City Hall and on the City's website.

In order to meet the requirements of the Texas Open Meetings Act, any item posted on the agenda must be written in a way that clearly shows the content of the discussion, or report that will be discussed.

Pursuant to the Texas Open Meetings Act, there **should not** be any discussions by a quorum of the Board, or Commission, of any City related business that is listed on an agenda or may be listed on a future agenda. Discussions include verbal and written communications.

#### **D. PUBLIC HEARINGS**

Some boards hold public hearings, which are open forums that allow the public an opportunity to express their opinion on a specific issue related to the City of Grapevine. Public hearings are generally conducted in the following manner:

1. The chairman of the board or commission formally opens the public hearing and asks the staff member to present the issue to the public.
2. Any consultants, developers, etc. (if applicable) will then be given the opportunity to present their project and answer questions from the board.
3. All proponents (those in favor) and opponents (those against) of the measure are then given the opportunity to speak.
4. The chairman will then close the public hearing.

#### **E. CITIZEN COMMENTS**

Every agenda for every board, shall have an item to allow citizen's the opportunity to speak on any item of their choice, including items listed on the agenda.

In accordance with the Texas Open Meetings Act, the Board is restricted in discussing or taking action during Citizen Comments.

## CHAPTER V.

### CITY OF GRAPEVINE BOARDS AND COMMISSIONS PURPOSE, MEMBERSHIP AND MEETING DATES

The City of Grapevine is fortunate to have so many citizens who are willing to volunteer their time, energy, and expertise to serve the community as members of our boards and commissions. Appointments to advisory boards and commissions are made by the City Council each July. Listed below is a brief description of each advisory board or commission, its function, and composition of the membership.

**ANIMAL SHELTER ADVISORY COMMITTEE:** Composed of seven members including at least one licensed veterinarian, a Municipal Official, a Municipal Employee/Animal Services Manager, Animal Welfare Representative and three Grapevine citizens. This board advises the City's Animal Control Division regarding issues pertaining to animal bite prevention, zoonotic disease transmission, animal care and welfare, animal rescue, animal shelter standards, training of animal shelter personnel and any other issues required by State law. Meetings are held three times a year.

**BOARD OF ZONING ADJUSTMENTS:** Composed of five regular members appointed for over-lapping two-year terms and two alternate members that serve for two years. The board hears and rules on appeals from enforcement of and special exceptions to the City Zoning Ordinance, and authorizes variances from that zoning ordinance when not contrary to the public interest. Meetings are on the first Monday of each month. (Appendix "D", Section 68, City of Grapevine Code of Ordinances).

**BUILDING BOARD OF APPEALS:** Consists of eight members appointed for over-lapping two-year terms and one alternate member appointed for a one-year term. This board hears and rules on appeals to the City's Building Code, advises on the applicability of alternate materials and types of construction and considers plumbing and permitting issues. Meetings are held on the second Monday of each month. (Chapter 7, Section 7-4 City of Grapevine Code of Ordinances).

**CONVENTION AND VISITORS BUREAU BOARD:** Comprised of nine regular members appointed for over-lapping two-year terms and two alternate members appointed for a one-year term. The board acts in a general advisory capacity in matters relating to the Convention and Visitors Bureau, including budget preparation and evaluation of the effectiveness of convention and tourist programs. Meetings are held on the third Thursday of each month. (Chapter 21, Section 21-28 City of Grapevine Code of Ordinances)

**GOLF COURSE ADVISORY BOARD:** Consists of nine resident members who are active golfers, or are members of the Grapevine Golf Association who are appointed for over-lapping terms of two-years. The Board works with the golf staff in considering suggestions for course and policy improvements and other matters relating to the Grapevine Golf Course. Regular meetings are held quarterly during the year. (Resolution No. 79-35 as amended)

**GRAPEVINE 4B ECONOMIC DEVELOPMENT CORPORATION BOARD:**

Comprised of three citizen members and four City Council members serving two-year terms that have the power to expend the proceeds of the economic development 4B sales tax, subject to the approval of the City Council. The Board may vote to approve the 4B Corporation budget; approve projects for the Corporation to undertake; and exercise all powers and rights of a nonprofit corporation under the Texas Nonprofit Corporation Act, except to the extent that such powers would be in conflict with the Development Corporation Act.

**GRAPEVINE HERITAGE FOUNDATION BOARD:** Consists of nine members serving over-lapping two-year terms. The Foundation serves to unite the community in promoting the preservation and restoration of Grapevine's historic structures and record Grapevine's heritage. Board members serve on working committees for the Heritage Center, Palace Theatre, Heritage Education Program, etc. Meetings are held bi-monthly on the third Wednesday; additional time commitments may be required. (Resolution No. 90-17 as amended)

**HISTORIC PRESERVATION COMMISSION:** Composed of seven members appointed for two-year over-lapping terms and one alternate member appointed for a one-year term. The Commission is comprised of members who have demonstrated outstanding interest in the historic traditions of the City and who have experience in the historic character of Grapevine. The Commission recommends designation of historic districts and landmarks based on historical and architectural significance; advises property owners; reviews and approves design proposals for restoration, alteration, or new construction in historically designated areas of the City. Meetings are held monthly on the fourth Wednesday of each month. (Appendix "G", City of Grapevine Code of Ordinances)

**HOUSING AUTHORITY BOARD OF COMMISSIONS:** Comprised of four citizen members and one housing authority resident member serving over-lapping two-year terms. The Grapevine Housing Authority manages and controls the low rent housing units of the City according to established Federal guidelines. The Board determines certain policies and purchases, and advises the Executive Director on other authorized matters. Meetings are held on the fourth Thursday of each month. (Local Government Code).

**LIBRARY BOARD:** Composed of seven citizen members serving over-lapping two-year terms. The board acts in an advisory capacity on matters pertaining to the Grapevine Public Library. Meetings are held quarterly on the third Monday. (City Charter Article 11, Section 11-11).

**METROPOLITAN TEEN COURT ADVISORY BOARD:** Is a joint board of the cities of Grapevine, Southlake, Colleyville and Keller. Each City appoints two members to serve on the Board. The Teen Court Advisory Board establishes policies and procedures for the operation of teen court as approved by Municipal Court Judges in participating cities. The Board is managed by the City of Southlake. Meetings are set by the Southlake Teen Court Coordinator.

**PARKS AND RECREATION BOARD:** Comprised of nine members serving over-lapping two-year terms; one representative from the GCISD School Board and two high school students who serve as ex-officio members that serve one-year terms.

The board advises and makes recommendations pertaining to the parks and recreation facilities and activities of the City. Meetings are held on the third Thursday of each month. (Chapter 16, Section 16-1 City of Grapevine Code of Ordinances.)

**PLANNING AND ZONING COMMISSION:** Consists of seven members serving over-lapping three-year terms and two alternates serving one-year terms. The commission recommends the boundaries of original zoning districts and appropriate regulations to be enforced therein, holds public hearings and prepares recommendations for the City Council pertaining to changes in zoning district boundaries or regulations, makes recommendations concerning property platting and replatting, and advises the City Council on creation of and additions to master land use and master thoroughfare plans for the physical development of Grapevine. Regular meetings are on the third Tuesday of each month, jointly with City Council. Special meetings and workshops can be called as needed. (City Charter, Article 8, Section 8.03).

**SENIOR CITIZENS ADVISORY BOARD:** Consists of nine members, seven of whom will be appointed by the City Council as regular members to serve over-lapping two-year terms and three ex-officio members representing the Senior Activities Center Advisory Council, the Grapevine Housing Authority, and the GRACE Board of Directors. The board acts in an advisory capacity to the City in matters pertaining to its senior citizens, helps identify the needs of senior citizens and enhance their quality of life, and uses all available resources to inform senior citizens of community services. Regular meetings are held on the first Tuesday of even months with special meetings as needed. (Resolution No. 2000-39).

APPENDIX A

LOCAL GOVERNMENT CODE

SUBTITLE C. MATTERS AFFECTING PUBLIC OFFICERS AND EMPLOYEES OF MORE THAN ONE TYPE OF LOCAL GOVERNMENT

CHAPTER 171. REGULATION OF CONFLICTS OF INTEREST OF OFFICERS OF MUNICIPALITIES, COUNTIES, AND CERTAIN OTHER LOCAL GOVERNMENTS

Sec. 171.001. DEFINITIONS. In this chapter:

- (1) "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.
- (2) "Business entity" means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 171.002. SUBSTANTIAL INTEREST IN BUSINESS ENTITY.

- (a) For purposes of this chapter, 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 of the business entity or owns either 10 percent or more or \$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.
- (b) 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.
- (c) A local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or affinity, as determined under Chapter 573, Government Code, has a substantial interest under this section.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989; Acts 1991, 72nd Leg., ch. 561, Sec. 37, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 76, Sec. 5.95(27), eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 849, Sec. 1, eff. Sept. 1, 1997.

Sec. 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.

(b) An offense under this section is a Class A misdemeanor.  
Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989.

**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.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989.

**Sec. 171.005. VOTING ON BUDGET.**

- (a) The governing body of a governmental entity shall take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest.
- (b) Except as provided by Section 171.004(c), the affected member may not participate in that separate vote. The member may vote on a final budget if:
  - (1) the member has complied with this chapter; and
  - (2) the matter in which the member is concerned has been resolved.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Renumbered from Sec. 171.006 and amended by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989.

**Sec. 171.006. EFFECT OF VIOLATION OF CHAPTER.**

The finding by a court of a violation under this chapter does not render an action of the governing body voidable unless the measure that was the subject of an action involving a conflict of interest would not have passed the governing body without the vote of the person who violated the chapter.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Renumbered from Sec. 171.008 by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989.

**Sec. 171.007. COMMON LAW PREEMPTED; CUMULATIVE OF MUNICIPAL PROVISIONS.**

- (a) This chapter preempts the common law of conflict of interests as applied to local public officials.

(b) This chapter is cumulative of municipal charter provisions and municipal ordinances defining and prohibiting conflicts of interests.

Amended by Acts 1989, 71st Leg., ch. 1, Sec. 40(a), eff. Aug. 28, 1989.

**Sec. 171.008. SERVICE ON BOARD OF CORPORATION FOR NO COMPENSATION.**

It shall be lawful for a local public official to serve as a member of the board of directors of private, nonprofit corporations when such officials receive no compensation or other remuneration from the nonprofit corporation or other nonprofit entity.

Added by Acts 1989, 71st Leg., ch. 475, Sec. 2, eff. Aug. 28, 1989.

**Sec. 171.009. PRACTICE OF LAW.**

- (a) For purposes of this chapter, a county judge or county commissioner engaged in the private practice of law has a substantial interest in a business entity if the official has entered a court appearance or signed court pleadings in a matter relating to that business entity.
- (b) A county judge or county commissioner that has a substantial interest in a business entity as described by Subsection (a) must comply with this chapter.
- (c) A judge of a constitutional county court may not enter a court appearance or sign court pleadings as an attorney in any matter before:
  - (1) the court over which the judge presides; or
  - (2) any court in this state over which the judge's court exercises appellate jurisdiction.
- (d) Upon compliance with this chapter, a county judge or commissioner may practice law in the courts located in the county where the county judge or commissioner serves.

Added by Acts 2003, 78th Leg., ch. 227, Sec. 21, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1206, Sec. 3, eff. June 20, 2003.



## RULES OF PROCEDURE

### OF THE BUILDING BOARD OF APPEALS As Amended September 11, 2007

#### ARTICLE I. GENERAL PROVISIONS.

Section 1: These rules are supplementary to the provisions of the Code of Ordinances of the City of Grapevine, Texas, as they relate to procedures of the Building Board of Appeals.

Section 2: Any member who has any interest in a matter before the Board as that term is defined under the conflict of interest statutes of the State of Texas, including Article 988b, V.T.C.s., or any other applicable law shall not vote thereon at any meeting or hearing at which said matter is under consideration and shall take or refrain from taking any other action required by applicable laws.

Section 3: Members of the Building Board of Appeals shall base their consideration of matters on which the Board conducts a public hearing upon the following information and evidence:

- (a) Testimony, exhibits, and argument presented at the hearing, and not upon direct or indirect communication with any party or representative of such party made outside of the hearing;
- (b) Reports, memoranda and other materials prepared by the Director of Public Works, the Building Official, or his designee, or other employees of the City of Grapevine in connection with the application and made a part of the record at the time of hearing; and
- (c) Inspections of the site. Inspections of the site by the Board at which City staff and/or the applicant, or their respective representatives, are to be present require notice to the City staff and the applicant of the date, time and location of the inspection to be given. Notice shall be sufficient upon deposit of same in the U. S. Mail properly addressed and postage prepaid not less than seven (7) days prior to the inspection.

Section 4: Nothing herein shall be construed to give or grant to the Board the power or authority to alter or change the Code of Ordinances, including the adopted construction codes of the City of Grapevine, which authority is reserved to the governing body.

Section 5: The City Attorney shall be located at 200 S. Main Street, Grapevine, Texas.

Section 6: All references to the Building Official shall mean the Director of Development Services/Building Official or his designated representative.

#### ARTICLE II. OFFICERS AND DUTIES.

Section 1: The officers shall be a Chairman, a Vice-Chairman, and a Secretary, all of whom shall be selected by the Board from among its regular members.

- Section 2: The Chairman shall supervise the affairs of the Building Board of Appeals. He shall preside at all meetings of the Board, shall appoint such committees and subcommittees as may be necessary to carry out the purposes of the Board, and shall provide for the oath to be administered to all witnesses in cases before the Board. The Chairman shall be an ex officio member of all committees and subcommittees so appointed.
- Section 3: The Vice-Chairman, in the absence or disability of the Chairman, shall perform all the duties and exercise all the powers of the Chairman.
- Section 4: The Secretary, or the Secretary's designee, shall record and maintain permanent minutes of the Board's proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact; shall keep records of its examinations and other official actions; shall provide for the keeping and transcription of stenographic transcripts of all hearings when required by these rules; shall record the names and addresses of all persons appearing before the Board; shall, subject to the Board and Chairman, conduct the correspondence of the Board and have published in a local newspaper public notices of meetings or hearings as required by law and these rules of procedures; shall file said minutes and records in the office of the Board, which minutes and records shall be a public record. The Secretary shall be the custodian of the files of the Board and keep all records.

### ARTICLE III. MEETINGS.

- Section 1: Regular meetings shall be held on the 2<sup>nd</sup> Monday of each month at 6:15 P.M., in the City Council Chambers at 200 S. Main Street, Grapevine, Texas unless such day shall be a recognized holiday. In that event, the regular meeting shall be held on the second Thursday of that month, or at such other time as the Chairman may designate. A Briefing Session will be held at 6:00 P.M., before each regular meeting in the Planning and Zoning Commission Conference Room, Second Floor, 200 S. Main Street.
- Section 2: Regular meetings may be canceled by the Chairman when there are not cases pending. Notification must be given to members, however, not less than 24 hours prior to the time set for such meetings.
- Section 3: Special meetings may be called by the Chairman at his discretion, or upon the request of two (2) or more members, provided that 24 hours notice is given each member.
- Section 4: All meetings shall be open to the public.
- Section 5: A quorum shall consist of four (4) regular or alternate members for any regular or special meeting, and is required for any decision, determination, or official action by the Board.
- Section 6: A quorum of the Board shall be present at all public hearings and for the transaction of any business.

ARTICLE IV. ORDER OF BUSINESS.

Section 1: All meetings of the Board shall proceed on the following agenda:

- (a) Roll call and declaration of quorum.
- (b) Reading and approval of minutes of previous meeting.
- (c) Communications.
- (d) Consideration of draft findings from prior meetings.
- (e) Reports of committees.
- (f) Call of cases on agenda and hearing of requests for continuance.

Continuances.

Continuances may be granted at the discretion of the Board in any case for good cause shown and to any interested party who has entered his appearance as follows:

- (1) New cases – first time agenda:  
Continuances may be granted upon request.
- (2) Continued cases:  
All cases which have previously appeared on the agenda of the Board constitute continued cases. A request for a further continuance will be considered upon application therefore by the party or his representative at the time the case is called, and upon showing:
  - (a) that he has given reasonable notice in writing to all persons who have filed an appearance in the matter, and
  - (b) that for good cause he will be unable to proceed with his evidence at this hearing.

Failure of Applicant to Appear.

- (1) The Chairman may entertain a motion from the Board to dismiss a case for want of prosecution if the Applicant or his representative fails to appear.
- (2) In cases which are dismissed for want of prosecution, the applicant will be furnished written notice of that action by the Secretary of the Board.
- (3) The applicant shall have ten (10) days from the date of notice of dismissal to apply for reinstatement of the case. In such cases, applicant must file a written request with the Secretary for reinstatement. Reinstatement shall be at the discretion of the Board for good cause shown.
- (4) In all cases reinstated in the above described manner, the case will be docketed and readvertised in the usual manner prescribed for new cases.
- (5) If no application for reinstatement is properly and timely received, the ruling of the Board shall become final.

- (6) The Board may grant a continuance for a case for which the applicant fails to appear. Only one continuance may be granted by the Board for failure of the applicant to appear.
- (g) Public hearings for cases on agenda.
- (h) Unfinished business.
- (i) New business.
- (j) Adjournment.

ARTICLE V. PROCEDURES OF APPEALS.

- Section 1: An appeal from a decision of the Director of Development Services/Building Official or his designated representative of the City may be taken by any person aggrieved, officer, department, board, or bureau of the City affected by the decision.
- Section 2: The officer from whom the appeal is taken shall transmit to the Secretary of the Board all papers constituting the records upon which the action appealed from was taken.
- Section 3: The applicant shall provide all the information required on the appeal application form as well as any additional information that may be required by the Board to aid it in reaching a decision.
- Section 4: Upon receipt of the properly filed appeal application form, the Secretary of the Board, or his designee, shall assign a case number and place it on the calendar of the Board for hearing at the next regular meeting of the Board after the expiration of the notice period specified in the Rules. Applications for appeals shall be assigned for hearing in the order in which they are received. An appeal shall be filed with an accompanying application.
- Section 5: The filing of an appeal stays all proceedings in furtherance of the action appealed from, unless the administrative officer from whom the appeal is taken certifies to the Board that, by reason of the facts stated in the appeal application, a stay would, in his opinion, cause imminent peril to life or property. In this event, proceedings cannot be stayed other than by a restraining order granted by the Board or by a court of record on application, and on notice to the administrative officer and due cause shown.
- Section 6: The applicant shall pay such fee as may be established by the City Council which amount shall be deposited with the Department of Development Services for each application filed.
- Section 7: Each application shall be accompanied by a list of the persons whom the applicant expects will testify at the public hearing on the application and a brief statement of the matters that the applicant anticipates will be covered in the testimony of each person.
- Section 8: Not less than 30 days prior to the public hearing, the applicant shall file with the Building Official **(28)** copies of all reports, memoranda and exhibits that the

applicant expects to present at the public hearing. In the case of large exhibits, photographic reductions not less than eight inches by ten inches in size may be filed in lieu of the original exhibits.

## ARTICLE VI. NOTICES OF HEARINGS.

Section 1: The Secretary of the Board, or his designee, shall give due notice of the place and time for hearing of the appeal application, to the parties concerned by U.S. Mail, properly addressed and postage prepaid, not less than ten (10) days prior to the hearing. Such notice shall state the name and address of the applicant, the name and address of the owner of the property, and a brief statement of the nature of the appeal or application. Such notice shall be sent to the applicant and all other persons who are owners of real property lying within two hundred (200) feet of the property which is the subject of the hearing and who have rendered their said property for city taxes as the ownership appears on the last city tax roll. The number of feet occupied by all public roads, streets, alleys, and other public ways shall be excluded in determining the 200 foot requirement.

## ARTICLE VII. PROCEDURES ON HEARINGS.

Section 1: At the time of the hearing, the applicant may appear in his own behalf or be represented by his counsel or an agent.

Section 2: In the event that objectors retain counsel to represent them at a hearing before the Board, then such counsel shall notify the applicant, or his agent or attorney, and the Secretary of the Board that he has been so retained and will be present to object. Such notice shall be delivered to the offices of the Board and to the appellant or applicant, or his agent or attorney, at least five (5) days prior to the scheduled hearing dates. If such notice is not given by counsel retained by the objectors, then the applicant, or his agent or attorney, shall have the option of postponing the hearing to the next regular meeting of the Board. Not less than seventy-two (72) hours prior to the hearing, objectors shall file with the Building Official **(23)** copies of all reports, memoranda and exhibits that such objectors expect to present at the hearing. In the case of large exhibits, photographic reductions not less than eight inches by ten inches in size may be filed in lieu of the original exhibits.

Section 3: All testimony at any public hearing shall be under oath, or by affirmation, administered by the Chairman.

Section 4: Upon written request of the City staff, the applicant for the Building Board of Appeals, filed with the Secretary of the Board at least five (5) days prior to the public hearing, a stenographic transcript of the public hearing and the deliberations of the Board shall be kept. The cost of providing stenographer shall be borne by the party making the request. The cost of receiving a copy of the transcript shall be borne by the party requesting the copy.

Section 5: The applicant or his representative may make an initial statement outlining the nature of his request prior to introducing evidence.

Section 6: Any person who has an interest in the subject matter of the hearing shall be afforded an opportunity to present evidence, exhibits, and argument, and to question through the Chairman of the Building Board of Appeals witnesses on all relevant issues, subject to the Chairman's imposition of reasonable limitations on the number of witnesses, and the nature and length of testimony and questioning.

Section 7: Evidence shall be presented in the following order:

- (a) City staff presents evidence, including staff report.
- (b) Applicant presents evidence, including an initial statement if desired.
- (c) Objectors present evidence, including initial statement if desired.
- (d) Board members may question City staff, applicant's and objector's witnesses.
- (e) City staff may question applicant's and objector's witnesses.
- (f) Applicant may question City staff's and objector's witnesses.
- (g) Objectors may question City staff's and objector's witnesses.
- (h) Rebuttal by City staff.
- (i) Rebuttal by applicant.
- (j) Rebuttal by objectors.

Section 8: The Board shall not be bound by the strict rules of evidence, but it may exclude irrelevant, immaterial, incompetent, or unduly repetitious testimony or evidence, or any evidence that does not comply with these rules.

Section 9: An applicant or objector, or his agent or attorney, may submit a list of persons favoring or opposing the application. Such list will be accepted as an exhibit if it contains nothing more than a brief statement of the position of the persons favoring or opposing the appeal or application, together with the signatures and addresses of the persons subscribing to such statement.

Section 10: The Chairman shall rule on all questions relating to the admissibility of evidence, which may be overruled by a majority of the Board.

#### ARTICLE VIII. PROCEDURES FOR CONSIDERATION AND RECOMMENDATION OF AMENDMENTS TO THE GRAPEVINE CODE OF ORDINANCES.

Section 1: The Board may consider amendments to the Grapevine Code or Ordinances relative to Buildings and Construction, Health and Sanitation, or other related items contained in the Grapevine Code of Ordinances when requested by the Building Official or any other administrative officer of the City, a Board member, or an applicant.

Section 2: The decision of the Board that evidence exists to warrant a change to the Code of Ordinances shall be forwarded as a recommendation to the City Council.

#### ARTICLE IX. DECISIONS.

- Section 1: All deliberations of the Board shall be conducted, and all of its decisions shall be made, at a meeting that is open to the public.
- Section 2: Final decisions shall be made by the Board within forty (40) days from the date of the hearing.
- Section 3: The Board may conduct its deliberations and vote on all matters in public session at the meeting in which evidence is concluded, unless the Board considers additional time for deliberation necessary. The Board may direct the Building Official to prepare draft findings of fact and conclusions reflecting the tentative findings and conclusions reached by the Board as a result of its deliberations. Such draft findings of fact and conclusions shall be made available to the applicant, objectors and all other interested persons at least seven (7) days before the meeting of the Board at which they are considered and action is taken with respect to the draft findings and conclusions. Upon presentation to, and consideration by the Board, said draft findings and conclusions may be amended by a motion duly made, seconded, and approved by the Board.
- Section 4: If any regular or alternate member shall abstain voting on any item(s), such member should abstain from voting on or discussing any item on the meeting agenda. Such member should remove themselves from the dais, and should be seated with the audience or leave the room. An alternate member or members shall then take the place of the abstaining member(s).
- Section 5: Alternate members should refrain from discussing issues involved with cases, unless such alternate member is sitting in place of a regular member who is absent or abstaining.
- Section 6: A majority vote of the Board members present shall be necessary to reverse any order, requirement, decision, or determination of the Building Official, or other administrative officer, or to grant any variance.
- Section 7: Prior to the motion to approve or deny the appeal, the Board shall determine whether a special condition(s) exists. Such special condition(s) shall be enumerated in the form of a motion by a Board member, and voted on by the Board. If no special condition exists, the case is to be denied by a motion to deny.
- Section 8: All decisions of the Board shall be made at a public meeting on a motion duly made and seconded, and by the Chairman polling the membership by a roll call vote. The motion which decides the issue on any matter before the Board shall be to adopt the written findings of fact and conclusions stating the reasons for the determination by the Board as submitted or as submitted and amended. If conditions are imposed in the granting of a variance, such conditions shall be set out in the findings and conclusions.
- Section 9: The transcript of the hearing shall be acknowledged as to accuracy by the Chairman and the Secretary and shall be a part of the public record of the Board.

Section 10: Notice of the decision and a copy of the findings and conclusions adopted by the Board shall be given to the applicant, the Zoning Administrator, and other interested parties as soon as possible after the decision is reached.

ARTICLE X. RECORDS.

Section 1: A file of materials and decisions relating to each case shall be kept by the Secretary as part of the records of the Board.

Section 2: All records of the Board shall be a public record.

ARTICLE XI. AMENDMENT OF RULES.

Section 1: These rules may be amended by a resolution adopted by an affirmative majority vote of the members of the Board.

Section 2: The proposed amendment must be presented in writing at a regular or special meeting at which the vote is taken.

The foregoing rules and regulations are hereby adopted by the Building Board of Appeals of the City of Grapevine, Texas, on September 11, 2007.

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CHAIRMAN

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ATTEST

**AFFIDAVIT OF CONFLICT OF INTEREST**

STATE OF TEXAS            §  
COUNTY OF TARRANT   §

I, \_\_\_\_\_, as a member of the \_\_\_\_\_, make this affidavit and hereby on oath state the following: I, and/or a person or persons related to me in the first or second degree by either affinity or consanguinity, have a substantial interest in a business or entity that would be peculiarly affected by a vote or decision of the \_\_\_\_\_ as those terms are defined in Article 988b, V.T.C.S.

Date of Meeting \_\_\_\_\_  
Agenda Item # \_\_\_\_\_ Case # \_\_\_\_\_  
Development Name/Contractor Name \_\_\_\_\_

\_\_\_\_\_ have/has a substantial interest in this agenda item and my participation could result in a special economic effect for the following reason(s): (Check all which are applicable).

- \_\_\_\_\_ Ownership of 10% or more of the voting stock or shares of the entity
- \_\_\_\_\_ Ownership of 10% or \$15,000 or more of the fair market value of the entity
- \_\_\_\_\_ Funds received from the entity exceed 10% of \_\_\_\_\_ gross income for the previous year
- \_\_\_\_\_ Real property is involved and \_\_\_\_\_ have/has an equitable or legal ownership with a fair market value of at least \$2,500
- \_\_\_\_\_ \_\_\_\_\_ have/has an equitable or legal ownership in real property with a fair market value of at least \$2,500.

Upon filing of this affidavit with the City Secretary, I affirm that I will abstain from voting on any decision involving this business entity and from any further participation on this matter whatsoever.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Signature of Official

\_\_\_\_\_  
Title

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_ known to me to be the person whose name is subscribed to the foregoing instrument and on oath stated that the facts hereinabove stated are true to the best of \_\_\_\_\_ knowledge or belief.

Given under my hand and seal of office this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

(SEAL)

\_\_\_\_\_  
Notary Public in and for the State of Texas



# OUTLINE OF BUILDING BOARD OF APPEALS MEETING PROCEDURE

## BRIEFING SESSION:

- Public meeting, but **NOT** a Public Hearing; public and applicants may attend but may not participate unless asked a specific question for clarification.
- New business – Building Official will present the case. Board members should use this opportunity to make sure they are clear on the specifics of the case. Asking questions at this point will help to make the public hearing more efficient. Board members should not use this briefing session to deliberate for or against the case.
- Building Official will present miscellaneous reports.

## REGULAR MEETING:

- Call to order
- New business
  - Chairman will open Public Hearing.
  - Building Official will present the case. Board members may ask Building Official questions.
  - Applicant will give presentation; Board may ask applicant questions.
  - Any other interested party may speak and be questioned.
  - Chairman closes Public Hearing.
  - Board deliberation
  - Motion to find (or not find) a Special Condition (“I move that in BBA case 25-\_\_\_\_, that a Special Condition exists, specifically that \_\_\_\_\_.”) or (“I move that in BBA case 25-\_\_\_\_, no Special Condition exists.”) If Staff feels that the case warrants approval, Staff will always list a Special Condition for you to use. However, you are **NOT** obligated to use the Special Condition proposed by Staff.
  - Vote
  - If the Board finds no Special Condition, the case is automatically denied.
  - If the Board finds a Special Condition exists, a motion must then be made to approve the case: (“I move that in BBA case 25-\_\_\_\_, the request for \_\_\_\_\_ be approved”.)
  - Vote
  - Consideration of Minutes (vote required for approval).
  - Meeting adjourned



# OUTLINE OF BUILDING BOARD OF APPEALS MEETING PROCEDURE (DANGEROUS BUILDINGS)

## BRIEFING SESSION:

- Public meeting, but **NOT** a Public Hearing; public and applicants may attend but may not participate unless asked a specific question for clarification.
- New business – Building Official will present the case. Board members should use this opportunity to make sure they are clear on the specifics of the case. Asking questions at this point will help to make the public hearing more efficient. Board members should not use this briefing session to deliberate for or against the case.
- Building Official will present miscellaneous reports.

## REGULAR MEETING:

- Call to order
- New business
  - Chairman will open **Public Hearing**.
  - Building Official will present the case. Board members may ask Building Official questions.
  - Applicant will give presentation; Board may ask applicant questions.
  - Any other interested party may speak and be questioned.
  - Chairman closes Public Hearing.
  - Board deliberation
  - Motion to find that the subject structure is (or is not) a Dangerous Building pursuant to Article II, Sec. 7-20 of the Grapevine Code of Ordinances. **Example:** “I move that in BBA case 25-\_\_\_\_, that this structure is a Dangerous Building pursuant to Article II, Sec. 7-20, and must be repaired or demolished within 30 days from today.”
  - Vote
  - Consideration of Minutes (vote required for approval).
  - Meeting adjourned

Should the property owner not comply with the order of the Board within the specific time limit, the Building Official will inform the Board at the meeting following the expiration of the time limit. At this meeting the Building Official will ask the Board to forward injunction City Attorney a request to seek injunction and demolition of the structure. The motion should be as follows:

- I move that in BBA case 25-\_\_\_\_, that after having been ordered to repair or demolish the structure within 30 days, the owner has taken no action. This noncompliance shall be reported to the City Attorney so that all necessary legal action may be taken.

All other meeting procedures are the same as for a regular Dangerous Building Case.



## RECOMMENDED MOTION PRACTICE FOR CITY OF GRAPEVINE BUILDING BOARD OF APPEALS

- I. Determine whether a **Special Condition** exists
  - A. The application form asks whether applicant to list the special conditions for each requested appeal. THE BURDEN IS ON THE APPLICANT, NOT THE BUILDING BOARD OF APPEALS, TO PROVE THERE IS A SPECIAL CONDITION.
  
- II. Make a motion to **Approve** or **Deny**
  - A. If a special condition **does not exist**, the case is to be denied by a motion to deny.
    1. I make a motion that no special condition exists. I move to deny the request.
  
  - B. If a special condition **does exist**, a motion is in order to consider approving the special condition(s). The motion should list the special conditions that would warrant approving the variance or special exception.
    1. I make a motion that the Board does hereby find that a special condition(s) exists and the special condition(s) is (list).
      - a. Special conditions might include hills, valleys, creeks, power poles, elevation and irregular lot or tract shape.
  
  - C. If the Board does find that special conditions exist, a motion is in order to consider approving the appeal. The motion should list the specific variance(s) or alternates being approved. The Board **can** reduce the amount of the applicant's variance or special request.
    1. I make a motion that the Board does hereby approve, (partially approve or deny) the appeal to:
      - a. **Always list section and subsection numbers of the code or ordinance and describe the specifics of the variance. The section, and subsection numbers and the amount of variance are always stated in the memo.**



*The Role, Responsibility and Liability  
of the Building and Standards Commission*

**September 10, 2012**

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# THE ROLE, RESPONSIBILITY, AND LIABILITY OF THE BUILDING BOARD OF APPEALS- A LEGAL PERSPECTIVE

## I. CONFLICTS OF INTEREST

A conflict of interest is a "term used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them." *Black's Law Dictionary, 5th edition*. There are two types of conflicts of interest that should be considered by any local public official in Texas. One is a statutory conflict that rises to the level of a "substantial interest" in a matter as defined in Chapter 171 of the TEX. LOCAL GOVT. CODE. The second is an ethical conflict that does not rise to a statutory level but nevertheless causes the official to consider whether participation on a matter might have the appearance of impropriety.

### Statutory Conflict of Interest

The existence of a statutory conflict of interest is determined by analyzing Chapter 171 of the TEX. LOCAL GOVT. CODE which preempts the common law of conflict of interests as applied to local public officials in Texas. In addition, the provisions of Chapter 171 are cumulative of municipal charter and ordinance provisions. *Id.* at §171.007. City Councilmembers are clearly governed by Chapter 171. In addition, the Texas Attorney General has held that members of a Planning and Zoning Commission are "local public officials" under Chapter 171. Op. Tex. Att'y Gen. No. DM-309. Further, it is safe to assume that all City Boards and Commissions are subject to the provisions of Chapter 171.

Determining whether a conflict of interest exists requires a two step process. The first step is to ascertain whether the official has a "substantial interest" in a matter being considered. Section 171.002 of the TEX. LOCAL GOVT. CODE defines a "substantial interest" as follows:

1. "Substantial interest" in business entity =
  - a. 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 the fair market value of the business entity; or

- b. funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.
2. "Substantial interest" in real property = an equitable or legal ownership with a fair market value of \$2,500 or more.
3. "Substantial interest" = if a person related to the official in the first degree by consanguinity or affinity has a substantial interest. (See Sec. 573 of TEX. GOVT. CODE).

The Texas Attorney General, in DM-309, stated that the conflict of interest provisions were broadly written and require an official to file an affidavit if he or she has a substantial interest in a business that is representing a property owner in a matter before the governmental body. This is required even if the representative has no economic interest in the matter before the body.

Once the local public official determines that he/she has a substantial interest in a matter being considered by the governmental body, the second inquiry is whether action on the matter would have a special economic effect on the business entity or on the value of the real property that is distinguishable from its effect on the public. TEX. LOCAL GOVT. CODE, Sec. 171.004. If there will be a special economic effect, as a matter of law, the local public official is required to declare a statutory conflict of interest by executing an affidavit stating the nature and extent of the interest prior to a vote or a decision on any matter in which the official has a substantial interest. In addition, the official must abstain from further participation in the matter. *ID.* Based on a 1992 Texas Attorney General Opinion, DM-130, this provision may require a city council member or commissioner to declare a conflict and abstain from participation in a zoning matter if the member lives within 200 feet of the area under consideration.

In a recent opinion, the Texas Attorney General determined that whether or not a "special economic effect" exists will always be a fact issue. LO-98-052. In this case, a Dallas city council member whose spouse had a substantial interest in American Airlines under Chapter 171 was also deemed to have a "substantial interest" in American Airlines. It was a fact question as

to whether particular actions by the Dallas City Council with respect to Love Field would have a special economic effect on American Airlines distinguishable from the public such that Chapter 171 would require the city council member to recuse herself from participating therein.

Finally, TEX. LOCAL GOVT. CODE, §171.003 prohibits a local public official from **knowingly** participating in a vote or decision on a matter involving a business entity in which the official has a substantial interest if it is reasonably foreseeable that an action on the matter would confer an economic benefit on the business entity. The penalty for violation of this section is considered a criminal act punishable as a Class A misdemeanor. A Class A misdemeanor is punishable by a fine not to exceed \$4,000.00; confinement in jail for a term not to exceed one year; or both a fine and confinement. Violation of Chapter 171 will not render an action of the governing body voidable unless the measure that was the subject of the action involving a conflict of interest would not have passed without the vote of the person who violated the chapter. TEX. LOCAL GOVT. CODE §171.006.

#### Ethical Conflict of Interest

An ethical conflict of interest is one that does not rise to the statutory level as set forth in the Local Government Code. As appointed and elected officials, however, it is vital to have the ability to abstain from participation in a matter if a vote on the matter would appear to involve a conflict of interest. The Texas Attorney General's Office recognizes the importance of avoiding the appearance of impropriety and advises that "given the penal provisions, in section 171.003, for "knowingly" violating section 171.004, it might, indeed, be advisable for a member to comply with the affidavit and abstention requirements of the latter section if he is in doubt as to whether his failure to do so will place him in violation of the section." DM-130 at 2. Many municipalities, however, have requirements contained in ethics ordinances and the by-laws of any board or commission that all members present at a meeting are required to vote and that an

abstention by any member will be counted as a "no" vote. This requirement has traditionally been added to "encourage" appointed board and commission members to vote on all matters, even those that are controversial. A more tenable approach would be to allow for the declaration, contained in the public record, of an ethical conflict of interest of a board member prior to any hearing or discussion on the matter in which the conflict arises. The member would then be permitted to abstain from participation in the matter without being counted as a "no" vote. For those boards and commissions with alternates, an alternate could be appointed to participate in the matter.

## II. GIFTS TO PUBLIC SERVANTS

Chapter 36 of the TEXAS PENAL CODE contains the provisions governing the offer and acceptance of gifts by public servants. Specifically, §36.08(a) prohibits a public servant in an agency that performs a regulatory function from **soliciting, accepting, or agreeing to accept** any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

Conviction of a violation of this provision constitutes a Class A misdemeanor and is punishable by a maximum fine of \$4,000.00; confinement in jail for a term not to exceed one year; or both a fine plus incarceration. §36.08(h). The TEXAS PENAL CODE does not prohibit:

- a. a gift or other benefit conferred on account of kinship or a personal, professional or business relationship **independent** of the official status of the recipient.
- b. a benefit required to be reported under lobby statute or election code.
- c. an item with a value less than \$50, excluding cash or a negotiable instrument.
- d. food, lodging, transportation, or entertainment accepted as a guest and reported as required by law.
- e. an item issued by a governmental entity that allows the use of property or

facilities owned, leased or operated by the governmental entity. §36.10.

A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious or scientific purposes. §36.08(I).

The TEXAS PENAL CODE §36.09 also prohibits **offering, conferring or agreeing to confer** any benefit on a public servant that he knows the public servant is prohibited by law from accepting. Conviction of a violation of this provision is also considered a Class A misdemeanor punishable as described above.

Finally, the TEXAS PENAL CODE §36.07 prohibits a public servant from soliciting, accepting or agreeing to accept an **honorarium** in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties. Conviction of a violation of this section is also punishable as a Class A misdemeanor. It is lawful, however, to accept transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event. §36.07(b).

### **III. OPEN MEETINGS ACT**

#### What is the Texas Open Meetings Act?

The Open Meetings Act, TEX. GOVT. CODE Ch. 551, "the Act," was enacted by the Texas Legislature in 1967 to safeguard the public's interest in the workings of its governmental bodies. The act makes openness the general rule rather than the exception and places the burden on the governmental body to find an exception to permit a closed meeting.

### What does the Act Require?

Section 551.002 of the Act provides that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." Further, Section 551.043 of the Act requires that notice of any meeting that is required to be open, be posted in advance of the meeting.

A "governmental body" is defined by §551.001(3) to include any "deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency or political subdivision of a county or municipality." Planning and Zoning Commissions, Boards of Adjustment, Sign Boards of Appeal, Park Board, Library Board and Economic Development Boards and the like would clearly meet the definition of a "governmental body".

"Meeting" is defined by §551.001(4) to include any "deliberation between a quorum of members of a governmental body, or between a quorum of members of a governmental body and any other person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered, or during which the governmental body takes formal action. The Act creates a specific exception to allow a quorum of members of a governmental body to attend social functions and conferences:

The term [meeting] does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of the governmental body at a regional, state or national convention or workshop, if formal action is not taken and any discussion of public business is incidental to the social function, convention, or workshop.

In other words, a quorum of members attending Christmas parties, happy hours, and TML workshop discussions would not automatically violate the Open Meetings Act.

The term "deliberation" is defined by the Act as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body and another

person, or concerning an issue within the jurisdiction of the governmental body or any public business.” Thus, in the example above, if a quorum of the members of a governmental body convened at a local bar during happy hour to discuss a controversial zoning matter that had been tabled from a previous meeting, the Open Meetings Act would be violated.

Sequential telephone calls among a quorum of members of a governmental body may constitute a violation of the Act if they involve the deliberation or discussion of matters over which the body has jurisdiction. This calls into question the practice many governmental bodies of taking "informal polls" over the telephone in preparation for a public meeting.

The notice and posting provisions of the Act are contained in sections 551.041 and 551.043 of the Act. As a general rule, notice of a meeting must be in writing and contain the date, hour, place and subject of the meeting. This notice must be posted in a readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting. Emergency notice provisions are contained in §551.045 of the Act.

#### Exceptions to the Open Meetings Act

The exceptions to the Act have been narrowly drawn but should not be forgotten by board and commission members as tools for wise decision-making. A governmental body may convene in "closed" or "executive" session with its attorney to seek the attorney's advice regarding pending or contemplated litigation or on a settlement offer, or to receive advice from its attorney "on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter." Section 551.071. This provision implements the attorney-client privilege **which can be waived** by communicating the privileged matters discussed in executive session to those outside the privilege.

The Act also contains a "staff report" exception that allows a governmental body to confer with one or more staff members if the only purpose of the conference is to receive

information from the employees or to question the employees. During this type of meeting, however, the body may not deliberate public business or policy that affects public business.

Other exceptions to the Act include deliberation on certain matters concerning the acquisition, sale or exchange of real property (§551.072); deliberation on gifts or donations (§551.073); deliberation on certain personnel matters (§551.074) and deliberation regarding the deployment of security devices (§551.076).

The procedure for convening a "closed meeting" or "executive session" is contained in §551.101 of the Act which provides:

If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:

- (1) announces that a closed meeting will be held; and
- (2) identifies the section or sections of this chapter under which the closed meeting is held.

The Act also requires the governmental body to create a certified agenda or make a tape recording of the closed meeting. Section 551.103. Finally, any final action, decision, or vote on a matter deliberated in a closed meeting must be conducted in an open meeting held in accordance with the provisions of the Act. Section 551.102.

#### Violation of the Open Meetings Act.

Violation of the Act causes any action taken by the governmental body to be voidable. Section 551.141. Further, it may subject a member of the governmental body to criminal penalties for a knowing violation or for conspiracy to circumvent the provisions of the Act. Sections 551.143 and 551.145. Disclosure of matters discussed in a closed meeting may also constitute criminal conduct. Section 551.146.

In the recent case of *Tovar v. State* (Tex. Ct. Crim. App. - 1998), the Texas Court of Criminal Appeals held that criminal responsibility can arise under the Act regardless of the Defendant's culpable mental state. In this case, Joseph Tovar, a former school board president, was indicted for two offenses involving the Act. Tovar unsuccessfully argued that in order to be found guilty he must have "knowingly" violated the Act. In a unanimous opinion, the Court of Criminal Appeals held that a member of a governmental body can be criminally responsible for his involvement regardless of his mental state with respect to whether the closed meeting is permitted under the Act. The Court further stated that the Act "places a duty upon members of governmental bodies to hold open meetings and a concomitant duty to find an exception to the general rule if the desire to have a closed meeting."

#### **IV. E-MAIL ISSUES FOR CITY OFFICIALS**

Few new workplace technologies have found such widespread and rapid acceptance as electronic mail (e-mail). However, e-mail is still a relatively new form of communication and - as is often the case - the law sometimes lags behind the every-developing technologies in the modern world. Compliance with the many laws that affect a city official is confusing and difficult, especially when dealing with emerging technological issues such as e-mail.

The following tips have been collected and combined from several sources, including personal experience and various Internet websites. The information below is intended as a guide for work-related e-mail. The tips may or may not apply to personal use of e-mail and certainly do not constitute legal advice.

Probably the most important lesson, which applies regardless of possible legal liability, is to never put anything in an e-mail that you do not want the world to know about. E-mails can be saved, forwarded, and - most importantly - are a permanent record that can be produced at a later date.

Golden Rules:

- 1) spell check e-mail and use punctuation and grammar.
- 2) open e-mail with a salutation and end with a closing and/or signature;
- 3) thank the recipient in advance if requesting help of information.

It reflects poorly on the sender when an e-mail is sloppily drafted. A thoughtfully drafted e-mail is a strong indication of education and professionalism. Of course, e-mail sent to an employer or customer may be more formal than to a colleague or friend. Each individual will need to determine the appropriate format based on the recipient and topic of the e-mail.

Finally, because it is impossible to incorporate verbal and nonverbal communications that normally accompany the spoken word into e-mail, do not forget the eye contact, tone of voice, and body language that we take for granted when communication in person is not available in the written word. The lack of these cues in e-mail can easily lead to misunderstanding.

Do not ever, ever, for any reason whatsoever, forward to work colleagues:

- 1) joke e-mails;
- 2) religious e-mails;
- 3) virus warnings;
- 4) chain letter e-mails; or
- 5) anything not work-related.

Never give out personal contact information of others without their specific permission to do so.

When using e-mail for work-related purposes, it is inevitable that city officials will receive angry, rude, or abrasive e-mails. Because people are not communicating face-to-face with e-mail, they are often very bold when using this method of communication. If it is necessary to respond, do so in a courteous and professional manner. If it is not, do not respond.

Many people have e-mail addresses, but some do not regularly check their mailboxes. Do not assume that because an e-mail address appears on a business card, a person regularly reads his or her e-mail. To avoid confusion, make sure your recipients are comfortable receiving e-mail.

The Texas Public Information Act (TPIA) gives the public the right to request access to government information. The preamble declares the purpose of the TPIA:

Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

The TPIA defines “public information” as information that is collected, assembled, or maintained by or for a governmental body. Under the definition, virtually every form of information is covered, including information recorded on, among other things, paper, film, tape, or a magnetic, optical, or solid state device that can store an electronic signal (e.g., a computer disk, hard drive, or other memory storage device).

Texas, like many other states, recognizes that work-related e-mail is information that may be subject to public disclosure. Thus, caution should be used when drafting and/or transmitting e-mail. The following sections provide a discussion of the many pitfalls a city official may encounter under the TPIA when using e-mail.

Sections 552.136 and 552.137 were added to the TPIA in 2001 and provide that an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure. However, a member of the public’s e-mail address may be released if the person gives his or her

affirmative consent to the release.

While the e-mail address of members of the public may be confidential, e-mail addresses of government officers or employees are not protected by §§ 552.136 and 552.137, nor are they automatically protected under other provisions.

However, city officers or employees are afforded some protection by § 552.117 of the TPIA. That provision excepts from disclosure the home address, telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under § 552.024. The attorney general's office has "read this exception to include the home e-mail addresses of government officials or employees as well."

The TPIA applies to electronically-generated documents. Since e-mail communications are a form of electronically-generated document, e-mail communications generated or received by city officials may become the subject of a public information request, just like other written correspondence. A request for e-mail should be analyzed and handled in the same way as any other request for printed or written documents.

The attorney general's office has recognized that work-related e-mail is public information subject to the TPIA. This recognition, by itself, is not too alarming. After all, other types of correspondence that do not fall within a statutory exception to disclosure are public.

More troubling is the fact that the attorney general, broadly interpreting the TPIA, concluded that home e-mail sent to or from a personal computer through a private e-mail account may be public information.

In 2001, the City of Arlington received a request for any city-related e-mails on any computer used by an Arlington city council member. The city released the e-mails from the council member's city e-mail account, but requested an attorney general opinion as to whether the e-mails contained in the council member's home computer were required to be released.

The city - along with supporting comments filed by the Texas Municipal League (TML) - argued that, even though the council member used her home computer e-mail account to interact with her constituents and others, the fact that no city funds were used to pay for the e-mail account or the computer, coupled with the fact that the e-mails were not held by the city, meant that the e-mails were not public information as defined by the TPIA.

Section 552.002(a) of the TPIA defines public information as “information that is *collected, assembled, or maintained under a law or ordinance* or in connection with the transaction of official business:

- (1) *by a governmental body, or*
- (2) *for a governmental body and the governmental body owns the information or has a right of access to it*

The city and TML argued that a council member’s home e-mails are not collected, assembled, or maintained by the governing body of a city, nor does the governing body of a city own or have a right of access to such e-mails. Neither the City of Arlington’s records control schedule, nor the city’s charter, required the retention of this type of information. The e-mails were not required to be maintained by the city, nor could the city require their disclosure.

Further, the city and TML argued that § 552.001 of the TPIA states that the public is only entitled to information regarding the “affairs of *government* and the *official acts of public officials.*” As quoted above, § 552.002(a) defines public information as related to “official business.” As the attorney general’s office stated in Open Records Decision No. 225 “[t]he governing authorities of representative bodies such as cities...can act only in meetings duly assembled and conducted, and only through properly recorded minutes of their operations.” Thus, it should be axiomatic that the members of local governing bodies can perform no official act except as part of a body at meetings properly convened and conducted.

The attorney general’s office disagreed. In a May 2, 2001 opinion, the attorney general’s office concluded that information is generally “public information” when it relates to the official

business of a governmental body or is maintained by a public official or employee in the performance of official duties, *even though it may be in the possession of one person*. Citing the preamble of the TPIA, the opinion states that “it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” The opinion cited Tex. Att’y Gen. ORD-635 (1995) or the proposition that:

Records that [are] clearly related to official business are public records subject to the act regardless of whether an individual member of a governmental body, the governmental body’s administrative offices, or the custodian of records holds the records. If a governmental body could withhold records relating to official business simply because they are held by an individual member of the governmental body, it could easily and with impunity circumvent the act merely by placing all records relating to official business in the custody of an individual member. The legislature could not have intended to permit governmental bodies to escape the requirements of the act so easily.

Further, the opinion repudiated the argument that the e-mails were not information connected with “official business” because one city council member’s statements cannot constitute an official act binding the city.

The one ray of light in the opinion is fact-based. The City of Arlington council member solicited citizens to communicate with her as a council member on her personal computer by including the home e-mail address on her city business card. Accordingly, the opinion appeared to rely somewhat on the fact that the council member made the decision to solicit city-business transactions over a home computer through her business card. According to the City of Arlington, the case is currently being appealed, but no final disposition has been reached.

## **V. PERSONAL LIABILITY**

In today’s legal environment, more and more elected and appointed public officials find themselves named as individually sued defendants in litigation involving the municipality. Many times these suits are brought against the individual, as well as the governmental entity,

even though the law may be quite clear that the individual is entitled to immunity from suit, and that the plaintiff, if successful in his claim, could recover all of his damages from the governmental entity. While some suits brought against public officials are well-founded and brought in good faith to deter egregious misconduct, many such suits, unfortunately, appear to be brought to harass and intimidate judgment in future controversial and hotly contested matters.

Civic-minded citizens bold enough to serve on elected and appointed decision making bodies should not be required to make decisions based on the overall general welfare of the community while facing the specter of litigation and discovery every time they vote according to conscious, but not in accordance with a particular group's desires. The potential for this situation obviously would act as a deterrent to a decision maker's uninhibited discharge of his or her duties in deciding important public issues, which decisions are to be based on the decision making body's collective and independent judgment, rather than the fear or threat of litigation and discovery. Fortunately, the doctrines of absolute and qualified immunity can protect decision makers from this type of harassment.

This section seeks to explore and discuss the individual immunity defenses available to public officials, including absolute and qualified immunities from federal civil rights claims and state law constitutional and statutory claims. Topics will include the evolution of immunity defenses, the distinction between immunity from damages and immunity from injunctive relief, individual versus official capacity suits and the functional approach to immunity analysis utilized by federal and state courts. The policy bases and justifications for absolute legislative immunity for public officials will be explored, as well as the legislative versus administrative acts test used by most courts to determine the availability of absolute legislative immunity for public officials.

#### **A. INDIVIDUAL IMMUNITY DEFENSES IN GENERAL**

Both federal and state courts have created special immunity defenses for certain classes of individual defendants who are sued in their individual capacities. These persons may be

entitled to an absolute immunity from suit and damages, or to assert a qualified immunity from suit and damages, depending on the particular functions exercised by the individuals. For example, while 42 U.S.C. §1983 contains no language addressing either absolute or qualified immunity for public officials alleged to have violated §1983, these immunities have nonetheless been judicially crafted from the common law as it existed when Congress enacted the Civil Rights Act of 1871, Section 1 of which is now codified as §1983. These historically recognized common law immunities were public policy driven and designed to protect public officials from litigation that might tend to chill the officials' proper exercise of discretion and divert the attention of public officials from their duties by unnecessary and time consuming litigation. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 319-20 (1975); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). As stated by the United States Supreme Court in *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), "[w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."

#### Types of Immunity Defenses

There are two types of immunity defenses available to public officials -- absolute immunity, which looks solely to the defendant's function, and qualified immunity, which looks at the objective reasonableness of the defendant's actions. The United States Supreme Court utilizes a functional approach in determining whether a particular class of individual defendants is entitled to absolute immunity or qualified immunity.

Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption for personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified"

immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

*Forrester v. White*, 484 U.S. 219, 224 (1988).

Utilizing a functional analysis, the Supreme Court has determined that state and regional legislators (when acting in a legislative capacity), judges (when acting within their jurisdiction) and prosecutors (when acting as advocates in the criminal process) are all absolutely immune from liability for damages under § 1983. See *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state legislators); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405-06 (1979) (regional legislators); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (prosecutors). Under a functional approach, determining what type of immunity applies to a particular official in a given case turns on the nature of the act being performed, rather than on the position or title held by the official.

#### Recent U.S. Supreme Court Case on Immunity

In early 1998 the U.S. Supreme Court in *Bogan v. Scott-Harris*, 1998 WL 85313, strengthened, and at least clarified, the law pertaining to the individual immunity of local elected officials. In Bogan, the Plaintiff filed suit against the City of Fall River, Massachusetts, the mayor and city council. Specifically, the Plaintiff alleged that the city council eliminated a city department in which she was the sole employee due to racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing a complaint against another city employee. At the trial level the jury returned a verdict in favor of all defendants on the racial discrimination charge, but found the city and the individual council members liable on the Plaintiff's First Amendment claim.

The U.S. Supreme Court held that local legislators are entitled to the same absolute immunity from civil liability for their Legislative activities as has long been accorded to federal, state, and regional legislators. The Court reasoned that the particular ordinance which eliminated the department, in substance, bore all the hallmarks of traditional legislation: It reflected a

discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents. Thus, this ruling stands for the proposition that so long as a local legislator is performing purely "legislative" functions there will be absolute immunity from suit and liability.

## **B. TEXAS STATE LAW OFFICIAL IMMUNITY**

### Overview

In Texas, local government officials are also entitled to the defense of official immunity in state law causes of action.

Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.

*City of Lancaster v. Chambers*, 883 S.W.2d 650, 652-53 (Tex. 1994). *See also Esparza v. Diaz*, 802 S.W.2d. 772, 778 (Tex. App. - Houston [14th Dist.] 1990, no writ). This immunity is indiscriminately and interchangeably referred to by Texas courts as official, governmental, quasi-judicial or qualified immunity. *See, e.g., Carpenter v. Barner*, 797 S.W.2d 99, 101 (Tex. App. - Waco 1990, writ denied) (immunity variously known as governmental, official, quasi-judicial or qualified); *Stimpson v. Plano Indep. Sch. Dist.*, 743 S.W.2d 944, 947-48 (Tex. App.-Dallas 1987, writ denied) (good faith immunity); *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App. - San Antonio 1981, writ ref'd n.r.e.) (quasi-judicial immunity). For consistency, this paper will use the term "official immunity." *See also Chapman v. Gonzales*, 824 S.W.2d 685, 687 (Tex. App. - Houston [14th Dist.] 1992, writ denied); *Brubaker v. Brookshire Mun. Water Dist.*, 808 S.W.2d 129, 133 (Tex. App. - Houston [14th Dist.] 1991, no writ); *Wyse v. Dep't of Public Safety*, 733 S.W.2d 224, 227 (Tex. App. - Waco 1986, writ ref'd n.r.e.); *Austin v. Hale*, 711 S.W.2d 64, 66 (Tex. App. - Waco 1986, no writ).

The purpose of official immunity is to insulate the functioning of government from the harassment of litigation, not to protect erring officials. The public would suffer if governmental officers, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions.

*Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (citation omitted).

Public officials are "liable personally only when, in the exercise of the powers conferred upon them, they have acted wilfully, maliciously or when activated by malice." *Brubaker*, 808 S.W.2d at 133. The doctrine of official immunity evinces this state's public policy to encourage public officials to carry out their duties without fear of personal liability. *Carpenter*, 797 S.W.2d at 101. *See also Wyse*, 733 S.W.2d at 227 ("Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of the consequences" (quoting *Harlow*, 457 U.S. at 819); *Baker*, 621 S.W.2d at 643 ("[I]f administrative officials are held liable for their tortious conduct, the prudent would be reluctant to enter governmental service and even competent persons who entered public life would not be zealous in discharging their duties."))

It is important to note that the doctrine of official immunity embraces the concept of both immunity from suit as well as immunity from damages.

The justification for [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the irresponsible, in the unflinching discharge of their duties.

*Baker*, 621 S.W.2d at 644 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). *See Also Esparza*, 802 S.W.2d at 778 (immunity from suit and liability).

#### Discretionary Function

Discretionary functions receive the protection of official immunity, but ministerial duties do not. *Kassen*, 887 S.W.2d at 9; *Chambers*, 883 S.W.2d at 653-54. If an act is such that the actor has no choice, and the law prescribes and defines the duties to be performed with such precision as to leave nothing to the exercise of discretion or judgment, it is ministerial. *Chambers*, 887 S.W.2d at 654. Specifically, the *Chambers* court defined ministerial as acts as

those

[w]here the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment . . . but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.

*Chambers*, 883 S.W.2d at 654. The Supreme Court has acknowledged that the discretionary/ministerial distinction "is admittedly problematic," and that labeling an act as discretionary is "probably only a shorthand notation for a more complex policy decision." *Kassen*, 887 S.W.2d at 9.

In determining whether a particular function is a discretionary versus ministerial one for state immunity claims, courts look to whether the decisions are governmental or non-governmental in nature, and whether a law or regulation controls the acts of the officer in a particular situation. *See, e.g., Burgess v. Jaramillo*, No. 02-95-158-CV (Tex. App. - Fort Worth, January 11, 1996, n.w.h.), 1996 WL 10269, at \*3 ("Government employees are subject to suit if their acts are 'ministerial' acts involving mere obedience to orders or performance of duties requiring non-governmental choices, as opposed to 'discretionary ' acts regarding personal deliberation, decision, and judgment involving the government.") *Barker v. City of Galveston*, 907 S.W.2d 879, 888 (Tex. App. - Houston [1st Dist.] 1995, no writ) ("Thus to determine whether an act is ministerial or discretionary involves searching for a law or regulation controlling the acts of an official in a particular situation.").

Ministerial duties require only obedience to orders, or the performance of a duty in which the employee or officer has no choice of his own. [Citation omitted.] On the other hand, duties which are discretionary involve acts requiring personal deliberation, decision, and judgment on the part of the officer or employee. A state officer or employee who "is required to pass on facts and determine his actions by the facts found" is performing duties that are "quasi-judicial" in nature and are discretionary.

Chapman, 824 S.W.2d at 687 (citations omitted) (*quoting Torres v. Owens*, 380 S.W.2d 30, 33-

34 (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.). See also *Chambers*, 883 S.W.2d at 653; *Esparza*, 802 S.W.2d at 779. When a public official gathers facts and then acts, such actions are discretionary in nature. *Chambers*, 883 S.W.2d at 653; *Austin*, 711 S.W.2d at 66.

### Objective Good Faith

In *Chambers*, the Supreme Court established the test for good faith in the context of high-speed chases by police officers, holding that a police officer acts in good faith if

a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit.

*Chambers*, 883 S.W.2d at 656. *Chambers* derived its test for claims of official immunity from the federal law of qualified immunity, which requires courts to look to "whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Chambers*, 883 S.W.2d at 656.

While the Chambers official immunity test was tailored for the police pursuit context, appellate courts have not restricted its application to that context, and have applied the *Chambers'* objective test to fit the particular facts of each case. One court has explicitly stated that the *Chambers* good faith test applies in all qualified or official immunity cases. *Murillo v. Garza*, 881 S.W.2d 199, 202 (Tex. App. - San Antonio 1994, no writ). Other courts have simply adopted *Chambers* to fit their facts.

For instance, in *Fowler v. Szostek*, 905 S.W.2d 336 (Tex. App. - Houston [1st Dist.] 1995, no writ), various school officials were sued when a child the officials had removed from school for selling marijuana committed suicide. The court applied the *Chambers* test for official immunity, but modified it as follows: "We must look to whether a reasonable school official could have believed his or her conduct to be lawful in light of clearly established law and the

information possessed by the official at the time.” *Id.* at 342. In *City of Hempstead v. Kmiec*, 902 905 S.W.2d 118 (Tex. App. - Houston [1st Dist.] 1995, no writ), a police chief was sued for false arrest, false imprisonment, malicious prosecution, and defamation for his actions in investigating assault allegations against the plaintiff and signing and submitting a probable cause affidavit for her arrest. The court applied the *Chambers* test for official immunity, but modified it as follows: “[W]e hold that to meet his summary judgment burden, the Chief was required to show that a reasonably prudent officer could have believed that arresting the plaintiff was justified.” *Id.* at 121.

In *Rhodes v. Torres*, 901 905 S.W.2d 794 (Tex. App. - Houston [14th Dist.] 1995, no writ), a probation officer was sued when he arrested the plaintiff and moved to revoke her probation based on information that was ultimately found to be erroneous. The court applied the *Chambers* test as follows: “[W]e believe a reasonable articulation of the test for objective good faith as applied to this case is as follows: A probation officer acts in good faith in causing the arrest of a probationer if a reasonably prudent officer, under the same or similar circumstances, could have believed that causing the arrest of the probationer was lawful in light of clearly established law and the information possessed by the official at the time he filed the motion to revoke the probation.” *Id.* at 798. In *City of Dallas, v. Half Price Books, Records, Magazines, Inc.*, 883 905 S.W.2d 374 (Tex. App. - Dallas 1994, no writ), a police officer was sued for shooting and killing a man during an attempt to arrest him for stealing a taillight lens from a parked car. The Dallas Court of Appeals applied the *Chambers* test for official immunity, but modified it as follows: “Under *Chambers*, an officer acts in good faith if a reasonably prudent officer, under the same circumstances, could have believed that his acts were justified.” *Id.* at 377.

As in the case of federal qualified immunity, the good faith test for state law official immunity is a purely objective one. *See Gallia v. Schreiber*, 907 905 S.W.2d 864, 869 (Tex.

App. - Houston [1st Dist.] 1995, no writ) ("The test for good faith is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith."); *Cameron County v. Alvarado*, 900 905 S.W.2d 874, 880 (Tex. App. - Corpus Christi, 1995, writ dism'd w.o.j.) ("The *Chambers* court adopted the objective reasonableness requirement applied by the federal courts in an immunity analysis."); *Murillo v. Garza*, 881 905 S.W.2d 199, 202 (Tex. App. - San Antonio 1994, no writ ) (The *Chambers* test is "a test of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith.").

The "could have believed" aspect of the good faith test means that in order to be entitled to summary judgment, a public official must prove that a reasonably prudent government official might have believed that a reasonable basis existed to support the decision made or the take the action taken. An official does need not prove, however, that it would have been unreasonable to have not made the same decision. *See Chambers*, 883 S.W.2d at 656-57. The court in *Chambers* analogize this standard to "the abuse of discretion standard of review utilized by an appellate court when reviewing certain trial court rulings: an abuse of discretion is shown only when the trial court could not have reasonably the decision in question." *Chambers*, 883 905 S.W.2d at 657 n.7.

#### Summary Judgment Standards in Official Immunity Claims

To defeat an official's summary judgment proof on good faith, a plaintiff must do more than show that a reasonably prudent government official could have decided otherwise; rather, a plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Chambers*, 883 905 S.W.2d at 657. There must be a complete absence of reasonableness in the official's actions to establish bad faith under Chambers. In fact, a government official can be negligent in his decision, even according to a reasonably prudent government official, but as long as some reasonable prudent government

official "could have believed" that the official's actions were justified under the circumstances, the officials will not be found to have acted in bad faith. *See Chambers*, 883 905 S.W.2d at 656-57; *Wadewitz v. Montgomery*, No. 10-95-049-CV (Tex. App. - Waco, January 10, 1996, n.w.h.), 1996 WL 7166, at \*3.

To controvert an official's good faith, a plaintiff must show that no reasonable person in the official's position could have thought the facts were such that they justified the official's decision or actions. *See Chambers*, 883 905 S.W.2d at 656-57; *Barker*, 907 905 S.W.2d at 887. A plaintiff's elevated standard of proof is well-established. *See, e.g., Gallia*, 907 905 S.W.2d at 869 ("To controvert the officer's summary judgment proof on good faith, the plaintiff must do more than show that a reasonably prudent officer could have decided to take a different action; the plaintiff must produce evidence that no reasonable person in the defendant's position could have thought that the facts were such that they justified the defendant's acts."); *Richardson v. Parker*, 903 905 S.W.2d 801, 804 (Tex. App. - Dallas 1995, no writ) ("To controvert the official's summary judgment proof on good faith, the plaintiff must show that 'no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts.'"); *Alvarado*, 900 905 S.W.2d at 880 ("The *Chambers* good faith test sets an elevated standard of proof for a non-movant seeking to defeat a claim of official immunity in response to a motion for summary judgment."); *Murillo*, 881 905 S.W.2d at 202 ("To convert summary judgment proof that conclusively establishes 'good faith,' the plaintiff must show that no reasonable person in the defendant's position could have though the facts were such that they justified the defendant's acts.").

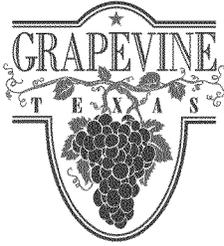


**2025**  
**CITY OF GRAPEVINE**  
**BUILDING BOARD OF APPEALS**  
**MEETING AGENDA SCHEDULE**

<b>FILING DEADLINE First Monday of the Month</b>	<b>MEETING DATES</b>
December 09, 2024	January 13, 2025
January 13, 2025	February 10, 2025
February 10, 2025	March 10, 2025
March 10, 2025	April 14, 2025
April 14, 2025	May 12, 2025
May 12, 2025	June 9, 2025
June 9, 2025	July 14, 2025
July 14, 2025	August 11, 2025
August 11, 2025	September 15, 2025 <small>3rd Monday, BZA on 8<sup>th</sup> due to Holiday on 1st</small>
September 8, 2025	October 13, 2025
October 13, 2025	November 10, 2025
November 10, 2025	December 8, 2025
December 08, 2025	January 13, 2026

**THE BUILDING SERVICES STAFF WILL DETERMINE  
THE AGENDA FOR EACH OF THE PUBLIC HEARING DATES.  
BASED ON THE SIZE OF THE AGENDA, YOUR APPLICATION  
MAY BE RESCHEDULED TO A LATER DATE.**





CITY OF GRAPEVINE, TEXAS  
BUILDING BOARD OF APPEALS MEETING MINUTES  
MONDAY, AUGUST 14, 2023

GRAPEVINE CITY HALL, COUNCIL CHAMBERS  
200 SOUTH MAIN STREET  
GRAPEVINE, TEXAS 76051

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6:00 p.m. Briefing Session – Planning and Zoning Commission Conference Room  
6:15 p.m. Public Hearing – City Council Chambers

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The Building Board of Appeals for the City of Grapevine, Texas, met on Monday evening, August 14, 2023, at 6:00 P.M. in the Planning and Zoning Conference Room, 2<sup>nd</sup> Floor, 200 South Main Street, Grapevine, Texas, for a Briefing Session with the following members present to wit:

Jerrold Sklar	Vice-Chairman
Shea Kirkman	Member
Gary Kemp	Member
Robert Rainwater	Member
Dave Custable	Member
Kirby Kercheval	Member

Constituting a quorum with Becky St. John and Joe Lipscomb absent. Also present were City Council Representative Chris Coy and the following City Staff:

Larry Gray	Building Official
Scott Leavelle	Assistant Building Official
Lindsay Carey	Planning Technician
Bryan Parker	Fire Marshall

**CALL TO ORDER:**

Building Official, Larry Gray called the Briefing Session of the Building Board of Appeals to order at approximately 6:05 P.M.

1. Roll Call

**BRIEFING SESSION:** – Planning and Zoning Commission Conference Room.

2. Conduct Oaths of Office for appointed and reappointed Board Members.
3. Board to appoint a Chairman and Vice Chairman.

For office of Chairman, Shea Kirkman nominate Joe Lipscomb. Robert Rainwater seconded the motion which prevailed by the following vote:

Ayes: Sklar, Kemp, Custable, Kercheval  
Nays: None

Abstain: None  
Absent: St. John, Lipscomb

Joe Lipscomb was re-elected as Chairman.

For office of Vice-Chairman, Dave Custable nominated Jerrold Sklar. Robert Rainwater seconded the motion which prevailed by the following vote:

Ayes: Kemp, Kercheval, Kirkman  
Nays: None  
Abstain: Sklar  
Absent: St. John, Lipscomb

Jerrold Sklar was re-elected as Vice-Chairman

4. Building Board of Appeals to conduct a briefing session to discuss items scheduled to be heard in the August 14, 2023, public hearing.

Building Official, Larry Gray briefed the Building Board of Appeals regarding the item scheduled to be heard in the regular public hearing.

#### ADJOURNMENT OF BRIEFING SESSION

With no further discussion, the meeting was adjourned at approximately 6:18 P.M.

**PUBLIC HEARING:** City Council Chambers.

Vice-Chairman Jerrold Sklar called the Public Hearing of the Building Board of Appeals to order at approximately 6:19 P.M.

5. Call to Order
6. Roll Call

#### CITIZEN COMMENTS

7. There was no one wishing to speak during citizen comments.

#### NEW BUSINESS

8. Building Board of Appeals to conduct a public hearing relative to Case BBA23-01 for the consideration of amending the recommendation to City Council for the adoption of the 2021 International Building Code to include amendments to the 2021 International Building Code (IBC), National Fire Protection Association (NFPA) and the 2020 National Electric Code (NFPA 70) regarding electric vehicle charging stations.

*Vice-Chairman Sklar closed the public hearing.*

Dave Custable made a motion to approve BBA23-01. Gary Kemp seconded the motion which prevailed by the following vote:

Ayes: Sklar, Kercheval, Kirkman, Rainwater  
Nays: None  
Abstain: None  
Absent: St. John, Lipscomb

9. Building Board of Appeals to consider the minutes of the December 12, 2022, meeting and take any necessary action.

Next the Building Board of Appeals to consider the minutes of the December 12, 2022, meeting.

Robert Rainwater made a motion to accept the minutes of the December 12, 2022, Briefing Session, and Public Hearing. Shea Kirkman seconded the motion which prevailed by the following vote:

Ayes: Kemp, Custable, Kercheval, Sklar  
Nays: None  
Abstain: Kemp  
Absent: St. John, Lipscomb

#### ADJOURNMENT

With no further discussion, Kirby Kercheval made a motion to adjourn. Dave Custable seconded the motion, which prevailed by the following vote:

Ayes: Kemp, Kirkman, Rainwater, Sklar  
Nays: None  
Abstain: None  
Absent: St. John, Lipscomb

The meeting was adjourned at approximately 6:24 P.M.

PASSED AND APPROVED BY THE BUILDING BOARD OF APPEALS OF THE CITY OF GRAPEVINE, TEXAS, ON THE 14TH DAY OF OCTOBER 2024.

APPROVED:

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CHAIRMAN

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SECRETARY