

# **Ethics and Personal Responsibility Guidelines for City of Austin Board Members**

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## **Introduction and Thank You**

Thank you for your public service as an appointee to a City of Austin board or commission. Local government depends on the service of community-minded individuals to perform many of its services and regulatory responsibilities. However, with public service come additional responsibilities. As a public servant you are subject to laws designed to ensure the transparency and impartiality of your government. It is your personal responsibility to be aware of the relevant rules and to comply with them. The purpose of these guidelines is to outline those rules and provide explanations to how they pertain to your service on a City board. In addition, Appendix A contains detailed explanations of a variety of situations that may be applicable to board members.

## **Types of Boards**

The City has labeled its appointed bodies with a variety of names such as board, commission, committee, council, or agency; however, the terms are all synonymous. For ease of reference, this paper uses the term “board” throughout. Some of these boards have responsibilities that are purely advisory and this paper will refer to them as “advisory boards.” Other boards exercise independent authority, i.e., the Planning Commission, the Board of Adjustment, and the Urban Renewal Board and will be referred to as “sovereign boards.” Finally, there are temporary bodies called “task forces” that are created for a specific purpose that expires on completion of an assigned task or on a specified deadline.

## **Minimum Standards of Conduct**

This explanation of the rules is not an endorsement of mere compliance as a standard of behavior. The rules set a minimum standard. The purpose of the law is to create and maintain public confidence in the decisions of the government by avoiding even the appearance of impropriety.

A City board member may not:

- transact any business in the member’s official capacity with any entity in which the member has a “substantial interest”,
- formally appear before the board of which he or she is a member while acting as an advocate for himself or herself, or for any other person, group, or entity,
- represent a private person or entity in an action in Municipal Court that was instituted by or arises from a decision of the member’s board,
- solicit or accept a gift or favor that might reasonably tend to influence the member in the discharge of the member’s duties or that the member should know has been offered with the intent to influence or reward official conduct,

- solicit or accept employment that could reasonably be expected to impair the member's independence in judgment or the member's performance of City duties,
- use City facilities, personnel, equipment or supplies for private purposes, except to the extent those things are available to the public.
- accept paid campaign work relating to a ballot proposition if the member's board exercised discretionary authority with respect to the proposition and the member participated in the board's discussion or vote.<sup>1</sup>

### **Conflict of Interest**

Members of all City boards and task forces are subject to the City's ordinances regarding conflicts of interest. Members of sovereign boards are also subject to the state conflict of interest statute (Chapter 171 of the Local Government Code). Some members who serve on boards that involve the use of federal funds can have conflict-of-interest requirements under federal law. When a conflict exists, the board member must recuse herself or himself from action.

A conflict of interest exists when a person's personal interests would reasonably be expected to affect the person's performance of a duty to another person or institution, or if it would reasonably appear so to an observer. Conflicts can arise in a number of ways, depending on the circumstances.

It is important to note that the existence of a conflict of interest does not say anything about the personal honesty of any individual or whether the individual will be influenced by the conflict. No matter how honest a person may be or how able a person is to set aside his or her personal interests, if a conflict exists it undermines the appearance of fairness and impartiality. It undermines the public's acceptance that all public decisions are being made for the public good.

It is not unusual for a conflict of interest to exclude a person from participating in a matter where the person would have a great deal to contribute. The same set of life experience that gives rise to expertise, often gives rise to personal interests that create conflicts. Forgoing this source of expertise is one of the trade-offs that are made in the interest of wide public acceptance of governmental actions.

Recusal means to remove oneself from participation in a matter to avoid a conflict of interest. Of course, a member of a City board is always at liberty to recuse on any matter if the member has a private interest that may affect (or appear to affect) the member's judgment. Under certain circumstances the law requires recusal. Failure to take the necessary action may result in a breach of the City's policies and may even result in criminal liability. Some conflicts of interest are such that they disqualify a person from membership on a board. For example, a city lobbyist is prohibited from serving as a board member (see Appendix A).

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<sup>1</sup>City Code, §2-7-62.

At the beginning of each meeting of your board, you will sign an attendance sheet. On this form you must indicate either (1) that you have no conflict of interest with any item on the agenda or (2) the number of the agenda item or items with which you do have a conflict of interest. If you have a conflict of interest with an item you must also recuse yourself from any discussion or vote on the item. The requirements for recusal vary depending on the type of board on which you serve. It is important to understand the requirements that apply to members of your board. These requirements are explained in detail below.

## **Recusal Requirements**

### **Recusal Requirement under the City Code - Applies to all Board and Task Force Members**

The City Code requires a board member to recuse when the member has a “substantial interest” in a person or entity that would be “affected” by a vote of the board of which he or she is a member. You, or the board of which you are a member, do not have to be the only decision maker or the final decision maker in order to be required to recuse, you just have to be part of the process.

“Affected” means “reasonably likely to be subject to a direct economic effect or consequence, either positive or negative, as a result of the vote or decision in question.” For instance, a person or entity owning real property, entering into a contract with the City, or seeking a permit or franchise is “affected” by votes or decisions such as zoning of the property, approval of the contract, or granting of the permit. The term “affected” does not include those persons or entities that are subject to an indirect or secondary effect from official action. Creditors, independent contractors, or guarantors of a person “affected” by a vote or decision are not also deemed to be “affected” by virtue of their relationship with the affected person. The vote or decision need not be the only producing cause of the economic effect or consequence. It is enough that the effect or consequence would be reasonably expected to occur.<sup>2</sup>

### **Substantial Interest under the City Code**

A person has a "substantial interest" in another person (“person” includes associations, businesses, corporations, and government agencies<sup>3</sup>) or in an entity (“entity” includes any entity recognized by law through which business may be conducted<sup>4</sup>) if:

- (1) the interest is ownership of 5% or more of the voting stock, shares or equity of the entity, or
- (2) the interest is ownership of \$5,000 or more of the equity or market value of the entity, or
- (3) funds received from the other person or entity during the previous 12 months or during the previous calendar year equaled or exceeded any one of the following:
  - (a) \$5,000 in salary, bonuses, boards or professional fees, or
  - (b) \$20,000 in payment for goods, products or nonprofessional services, or
  - (c) 10% of the person's gross income during that period, or

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<sup>2</sup>City Code, §2-7-2.

<sup>3</sup> City Code, § 1-1-2.

<sup>4</sup> City Code § 2-7-2.

- (4) the person serves as a corporate officer or member of the board of directors or other governing board of the entity (this criterion doesn't apply to a non-profit entity or to a corporate entity owned by the City or created by the City Council), or
- (5) the person is a creditor, debtor, or guarantor of the other person or entity in an amount of \$5,000 (this criterion doesn't apply to a home mortgage loan for the person's homestead or to a loan or lease of a personal automobile if entered into at a market rate with a commercial lending institution before the previous 12 months).<sup>5</sup>

A person has a substantial interest in real estate for purposes of Chapter 2-7 of the City Code if the person has a legal or equitable interest in the real property with a market value of \$5,000 or more.<sup>6</sup>

A substantial interest of a partnership, professional corporation, or other entity is deemed to be a substantial interest of a board member if:

- (1) the board member is a member of a partnership or professional corporation, or conducts business through another entity that has fewer than 20 partners or shareholders, or
- (2) the board member is a member of a partnership or professional corporation, or conducts business through another entity, and the official or employee has an equity interest, share, or draw equal to or greater than 5% of either
  - (a) the capital of the partnership, professional corporation, or other entity, or
  - (b) revenues of the partnership, professional corporation, or other entity.<sup>7</sup>

In addition, a board member has a substantial interest in a client of a partnership, professional corporation, or entity through which the board member conducts business if the official has personally acted in a professional or fiduciary capacity for that client within the preceding 24 months.<sup>8</sup> This applies regardless of the amount of funds received from the client.

A substantial interest of a spouse of a board member is a substantial interest of the board member.<sup>9</sup> (Except that the substantial interests of a partnership are *not* deemed to apply to a board member solely because the spouse of the board member does business through the partnership or other business entity.<sup>10</sup> However, income from a spouse's partnerships, business entities, or clients may constitute a substantial interest<sup>11</sup>.)

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<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup> City Code, § 2-7-61.

<sup>8</sup>Id.

<sup>9</sup> City Code, § 2-7-65(A).

<sup>10</sup> City Code, § 2-7-65(B).

<sup>11</sup>See City Code §2-7-2.

### **Failure to Recuse Under the City Code**

The City Code does not provide a criminal penalty for a failure to recuse with respect to a “substantial interest”.<sup>12</sup> However, even though the City Code does not create a criminal penalty for failure to recuse, it is an offense under state law if, with the intent to obtain a benefit or with the intent to harm or defraud another, a public servant knowingly violates a law relating to the public servant's office.<sup>13</sup> The City Code's recusal requirement is such a law. This offense is a Class A misdemeanor. It is punishable by a fine not to exceed \$4,000, up to a year in jail, or both.

In addition to potential criminal liability, an alleged violation of the City Code’s recusal requirement may also be heard by the City's Ethics Review Commission through a procedure set out in §§ 2-7-41 through 2-7-48 of the City Code. To summarize this process, the Ethics Review Commission, either on receipt of a complaint or on its own motion, may conduct hearings to determine if a violation has occurred. If the Ethics Review Commission finds that a violation has occurred, then it may impose a range of sanctions from a letter of notification (when it finds the violation is clearly unintentional) to a recommendation of removal by the City Council (when it finds that a serious or repeated violation has occurred through intentional or culpable disregard of the ordinance by a board member).<sup>14</sup>

In addition, the state law requiring recusal for a member of a board that exercises more than advisory power has its own criminal penalties, which are described in the next section.

### **Recusal Provisions of State Law - Applies to members of Sovereign Boards**

*In addition* to the requirements of the City Code discussed above, members of City boards that exercise authority beyond that which is advisory are subject to a state law that requires a board member to recuse when the member has a "substantial interest" in a person or entity that would be affected by a vote of the board. The state law provision is in chapter 171 of the Local Government Code. The state law is similar to the City Code provision and uses similar terminology, but differs in some important details and in the severity of the sanctions for a failure to comply. Remember, compliance with Chapter 171 is required *in addition* to compliance with the City Code.

A sovereign board is a board that has authority beyond that which is purely advisory. A sovereign board is always subject to the state law. The additional recusal requirements apply even when the sovereign board is only exercising advisory authority.<sup>15</sup>

To effectively recuse from a vote or decision under the state law, a board member must refrain from voting, and take no part in any discussions leading up to the vote. The exact words used in the state law are "shall abstain from further participation in the matter."<sup>16</sup> In addition, when recusal is required under

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<sup>12</sup> City Code, §2-7-48(A).

<sup>13</sup> Penal Code, §39.02(a) (1), and (b).

<sup>14</sup> City Code, §2-7-48(B) (1)-(4).

<sup>15</sup> Tex. Atty. Gen. Op. DM-309 (1994).

<sup>16</sup> Local Government Code, Section 171.004(a)

the state law, a board member with a substantial interest in a matter must file an affidavit with the City Clerk stating the nature of the interest. *This affidavit must be notarized and filed before the vote.*<sup>17</sup> So it is important that you read the agenda in advance, as it may not be possible to comply if you first become aware of the conflict at the meeting. Recusal is required when it is reasonably foreseeable that the board action will have a “special economic effect” on the entity or real estate in which the board member has a substantial interest that is “distinguishable from the effect on the public.”<sup>18</sup>

### **Substantial Interest under the State Law**

The state law has definition of "substantial interest" that differs somewhat from that used in the City Code. Under the state law 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.

Under the state law 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.

For purposes of the state law, a substantial interest of a board member’s relative in the first degree by blood or marriage counts as the Board member’s substantial interest.<sup>19</sup> Under the City Code, that interest is extended to the interests of a relative of the second degree, for members of boards that are not purely advisory.<sup>20</sup>

### **Failure to Recuse Under the State Law**

If the failure to recuse is with respect to a "substantial interest" as defined in the Local Government Code, a board member could be subject to prosecution for a Class A misdemeanor. This offense is prosecuted by the County or District Attorney. It is punishable by a fine not to exceed \$4,000, up to a year in jail, or both.

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<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Local Government Code, Section 171.002. A relative in the first degree is a spouse, father, mother, son, or daughter, or a spouse’s father, mother, son, or daughter.

<sup>20</sup> City Code, §2-7-65(C). A relative in the second degree is a sibling, a grandparent, a grandchild, the spouse of each of these, and the sibling, grandparents and grandchildren of your spouse.

## **How to Recuse Summary**

### **How to Recuse for Advisory Board Members**

If you are a member of an advisory board, and are required to recuse yourself on a matter before your board, the following steps are required:

- You must sign the attendance sheet at each meeting indicating that a conflict exists with a particular item on the agenda.
- You must state that you are recusing and why. This public disclosure of the nature and extent of the interest must appear “in the official records of the body”, meaning it must be included in the meeting’s official minutes.
- Take no part in any discussion or vote; whether on or off the dais. You do not have to leave the dais during the discussion or vote, but you may wish to do so.<sup>21</sup> Remember you may not appear before your own board as an advocate for yourself or any other person.

### **How to recuse for Sovereign Board Members**

- In addition to all the steps enumerated above for recusal by a member of an advisory board you must also file an affidavit that complies with Chapter 171 of the Local Government Code. This affidavit must be notarized and filed with the City Clerk before the board votes on the item with which you have a conflict.

## **Conflicts under Federal Law**

Generally, if a City board reviews a federally-funded project or activity, the members will be subject to the federal conflict of interest requirements attached to the federal program that is the source of the funding. Each federal program has a specific conflict of interest rule. Requirements set by various federal agencies may vary and the specific regulations with respect to the federal activity must be reviewed. Board liaisons can assist in providing federal program information that pertains to a board. What follows is a very general overview using a couple of Department of Housing and Urban Development (HUD) programs as an example. These examples suggest the framework of the federal approach to these issues.

HUD’s conflict of interest rules for various programs generally apply in a similar manner and apply to a City official or agent who exercises a function or responsibility with respect to an activity, or who is in a position to participate in a decision-making process or gain inside information with regard to an activity under the program.<sup>22</sup> The rules prohibit an official, or a person with whom the official has a family or

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<sup>21</sup> City Code, §2-1-24

<sup>22</sup> See, for example, 24 Code of Federal Regulations §570.611, Conflict of Interest (Community Development Block Grants); and 24 Code of Federal Regulations §574.625; Conflict of Interest (Housing Opportunities for Persons with Aids).

business tie, from having a financial interest in the federal activity. The prohibition applies during the official's tenure and for a year thereafter. HUD may grant a waiver if the nature of the conflict was publicly disclosed, if the conflict does not violate local or state law, and if HUD determines that granting the waiver will serve to further the purposes of the federal activity as well as the effective and efficient administration of the participating jurisdiction's program or project.<sup>23</sup>

Consequences for failure to comply could range from the loss of an opportunity to participate in a program to civil or criminal liability. Compliance with the federal conflict of interest requirements for a project will not ordinarily excuse failure to comply with local and state law requirements.

## **Gifts**

All ethics rules are designed to ensure transparency and impartiality in government and to ensure that a reasonable observer will have no reason to doubt that decisions are being made objectively and without the possibility of private gain.

The City exercises power over the public in a number of ways. The City regulates and people may fear the City's regulatory power; the City provides necessary services and people may be concerned about whether they can get services they need; and, the City plays a major role in the local economy and many businesses are dependent on City contracts. As a representative of the City, the public may project the perception of power to you as a board member.

A gift often carries the intent to favorably impress someone who might be in a position to do the person offering the gift some good or some harm. It may not be true but it may appear to be so to the observer. For example, if a vendor gets a contract and has given a gift to a person who has some discretion over the award of the contract, it may appear to other vendors that they must do likewise to be considered for City business.

The City's gift ordinance prohibits a City official from accepting any gift if the City official should know that the gift was offered with the intent to influence or reward official conduct.<sup>24</sup> For example, if a person knows you only in your capacity as a City board member or has business before your board, you should probably take it as a given that the City policy prohibits your accepting a gift from that person. There is no dollar amount associated with the City's gift policy.

People sometimes confuse the City's policy with the state criminal law on gifts to public servants.<sup>25</sup> The City's policy is stricter. If you comply with the City policy, you will never have to worry about the criminal law. Of course, you may never accept any benefit, however small, in exchange for an official act. That is the very serious crime of bribery.<sup>26</sup>

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<sup>23</sup> Id.

<sup>24</sup> City Code, §2-7-62(G)

<sup>25</sup> Penal Code, §§36.08 - 36.10

<sup>26</sup> Penal Code, §36.02



## **Annual Financial Disclosure**

Some City board members are subject to annual personal financial disclosure requirements under the City Code.<sup>27</sup> If you serve on one of these boards, the form will be sent to you by the Office of the City Clerk at the appropriate filing time. Failure to file may result in your being removed from the board.

## **Citations**

Austin City Code provisions can be seen in their entirety and in context on-line at Austin Go at <http://austintexas.gov/department/city-clerk/services> by selecting “City Code and Charter” on the Office of the City Clerk page. By expanding the titles in the framed version, sections may be easily found. The first number of a City Code section is the title number.

State statutes can be seen in their entirety and in context on-line at the Texas Legislature Online at <http://www.statutes.legis.state.tx.us/>. The statutes are organized by code.

The Code of Federal regulations is available at the U.S. Government Printing Office’s GPO Access site at <http://www.gpoaccess.gov/ecfr/>.

Texas Attorney General Opinions are available at <http://www.oag.state.tx.us/opinopen/opindex.shtml>, where they are indexed by number.

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<sup>27</sup> City Code, §2-7-71 et seq.

Following are several situations related to ethical dilemmas that board members could possibly encounter. Please review them carefully...

### **Lobbying**

A person who is registered, or who is required to register, as a lobbyist under the City's lobbying ordinance, or who or is an employee of a person required to register, may not serve on a City board until the expiration of three years after the date that the person ceases to be registered, required to be registered, or employed by a person registered or required to register.<sup>28</sup> The City's lobbying ordinance requires registration, with some exceptions, by a person who:

- receives compensation of \$200 or more in a calendar quarter for lobbying,
- receives reimbursement of \$200 or more in a calendar quarter for lobbying,
- or expends \$200 or more in a calendar quarter for lobbying, or who lobbies as an agent or employees of a person who meets one of those thresholds.<sup>29</sup>

Lobbying is communicating (other than by public expression at a meeting held under the Open Meetings Act) in an effort to influence or persuade a City councilmember, certain City employees<sup>30</sup>, or certain City board or commission members<sup>31</sup> on a municipal question (a proposed or proposal for an ordinance, resolution, motion, recommendation, report, regulation, policy, appointment, sanction, and bid, including the development of specifications, an award, grant, or contract for more than \$2,000). If you think you may be subject to the registration requirement, please review the requirement and the exceptions carefully.<sup>32</sup> **Note: This prohibition does not automatically apply to a member of a task force. Check the ordinance or resolution that created your task force for confirmation.**

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<sup>28</sup> City Code, §2-1-21(C).

<sup>29</sup> City Code, Chapter 4-8.

<sup>30</sup> The city manager, an assistant city manager, their aides, the city attorney and an assistant city attorney, a department head and deputy department head, and, where no deputy department head serves, the first principal assistant of the department. City Code §4-8-3(25).

<sup>31</sup> The Austin Airport Advisory Commission; Airport Zoning Commission; Arts Commission; Brackenridge Hospital Oversight Council; Building and Fire Code Board of Appeals; Building and Standards Commission; Telecommunications Commission; Civil Service Commission; Community Development Commission; Economic Development Commission; Electric Board; Electric Utility Commission; Environmental Board; Ethics Review Commission; Historic Landmark Commission; Human Rights Commission; Mechanical, Plumbing and Solar Board; Parks and Recreation Board; Planning Commission; Zoning and Platting Commission; a retirement board, including the Firemen's Relief and Retirement Fund Board and the Police Retirement Board; the Resource Management Commission; and the Water and Wastewater Commission; City Code §4-8-3(1) – (24).

<sup>32</sup> City Code, §§ 4-8-4 and 4-8-5.

### **Working with Non-profits**

The City Code provides that a City board member "who serves as a corporate officer or member of the board of directors of a nonprofit entity may not participate in a vote or decision regarding funding by or through the City for the entity."<sup>33</sup> If a matter regarding City funding for a non-profit is before your board, recusal will be required. Funding for a non-profit would include a City service contract with the non-profit.

If you are going to be engaged in fundraising or other solicitations on behalf of a non-profit, you will want to be careful about directing solicitations to people or businesses that have business with or who are regulated by your board, especially if you are well-known in your City role. You do not want a person to get the impression that their response to a solicitation is connected to a City decision affecting them.

### **Contracting With the City**

The City does not specifically prohibit board members from bidding or contracting with the City. However, seeking a City contract where your board has a role in the development, evaluation, or award of the contract can be problematic. A bidder is excluded from bidding if the bidder has had any involvement in the design or specifications of the procurement or if the bidder will have any role in the award of the contract or any advantage due to inside information. The rule is that you can participate in the development of the project or you can bid for the work, but you can't do both because it is anti-competitive.<sup>34</sup> The City's standard terms and conditions state, "No officer (board members are officers), employee, independent consultant, or elected official of the City who is involved in the development, evaluation, or decision-making process of the performance of any solicitation shall have a financial interest, direct or indirect, in the Contract resulting from that solicitation."

### **Procurement Matters**

Some procurement matters come before City boards before they are approved by the City Council. In order to ensure a level playing field for companies that are competing for City contracts, the City restricts communications from the competitors. If such a matter comes before your board, the competing companies should not be contacting you outside of the posted meeting of the board that is open to the public. If this happens, notify the designated City contact person for the solicitation. The contact could result in the company being disqualified.<sup>35</sup>

### **Urban Renewal Projects**

If you are interested in urban renewal, you should be aware that becoming a city official may restrict your ability to own an interest in an urban renewal project.<sup>36</sup>

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<sup>33</sup> City Code, §2-7-63(A).

<sup>34</sup> See Tex. Att'y Gen. Op. Nos. JC-0124 (1999) at 2; JM-940 (1988) at 7, JM-282 (1984) at 8.

<sup>35</sup> City Code, §2-7-101 et seq.

<sup>36</sup> Local Government Code, § 374.908.