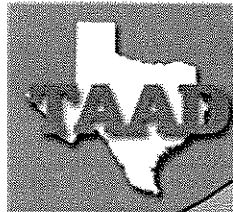


2008
BOARD OF DIRECTORS FORUM

**CRIMINAL AND CIVIL LIABILITIES FOR APPRAISAL
DISTRICT BOARD OF DIRECTORS**

**TEXAS ASSOCIATION OF APPRAISAL DISTRICT'S
Twenty-Seventh Annual Conference**



Presented by:

PETER G. SMITH

NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P.

1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201
www.njdhs.com

(214) 965-9900 (214) 965-0010 – Fax psmith@njdhs.com

© 2008

Peter G. Smith was born on September 4, 1952, in Providence, Rhode Island. He pursued his preparatory and legal education at Texas Tech University obtaining his B.A. in 1974 and J.D. in 1976. He is a member of Delta Theta Phi, Pi Sigma Alpha (Political Science Honorary), and the State Bar of Texas, State Bar of Texas Property Tax Committee.

Mr. Smith holds memberships in various professional associations including: Texas Municipal League; Texas City Attorneys Association; Texas Association of Assessing Officers; and Texas Association of Appraisal District. He is a member of the Advisory Board of Municipal Legal Studies Center, Center for American and International Law and frequently lectures and authors articles on ad valorem taxation and municipal law.

Mr. Smith is a partner in the law firm of Nichols, Jackson, Dillard, Hager & Smith, L.L.P., Dallas, Texas, with areas of expertise in ad valorem taxation, municipal law, administrative, and zoning law. His practice is devoted almost entirely to trial and appellate litigation on behalf of appraisal districts, property taxpayers and governmental agencies throughout the State. The Firm was initially formed in 1895, making it one of the oldest continuing law firms in Dallas, Texas. The firm has over forty years experience in ad valorem taxation and municipal law. The Firm serves as counsel for property taxpayers, appraisal districts, municipalities, and political subdivisions throughout the State. Currently, Mr. Smith is City Attorney for the Cities of Richardson, DeSoto, Allen and Sachse. He is also general counsel for the Denton County Transportation Authority, the Dallas Appraisal Review Board, and the Dallas, Tarrant and Williamson Central Appraisal Districts.

TABLE OF CONTENTS

- I. **PERSONAL LIABILITY**1
- A. **IMMUNITIES FROM SUIT AND LIABILITY IN PERSONAL CAPACITY**2
- 1. **Federal Court Qualified Immunity**.....2
- 2. **State Court Official Immunity**.....3
- B. **CAUSES OF ACTION TYPICALLY BROUGHT AGAINST INDIVIDUALS**.....4
- 1. **Violation of Civil Rights under 42 U.S.C. § 1983**.....4
- 2. **Slander and Libel**.....5
- 3. **Open Meeting Act Violations**.....6
- (a) **Guidelines Under the Open Meetings Act**.....7
- (b) **Closed or Executive Sessions**.....11
- (1) **Procedure for Closed Sessions**.....11
- (2) **Most Common Closed Meetings**.....12

- II. **ETHICS**.....13
- A. **ECONOMIC CONFLICTS OF INTEREST – TEXAS LOCAL GOVERNMENT CODE, CHAPTER 171**14
- 1. **Required Affidavit and Abstention**.....14
- 2. **What Constitutes a Substantial Interest?**14
- 3. **Substantial Interest Extends to Relatives in the First Degree**.....15
- (a) **Relatives in the First Degree**.....15
- (b) **Relatives in the Second Degree**.....15
- (c) **Relatives in the Third Degree**.....16
- 4. **Acting as a Surety Prohibited**.....16
- 5. **Majority of Members Substantially Interested**.....16
- 6. **Actions Not Voided by Board Member’s Participation**.....16
- 7. **Penalty for Failing to File or Participating**.....16
- B. **BANK DEPOSITORY - TEXAS LOCAL GOVERNMENT CODE § 131.093**.....17
- C. **CONFLICTS DISCLOSURE STATEMENT – TEXAS GOVERNMENT CODE, CHAPTER 176**.....17
- D. **PROPERTY TAX CODE**.....18
- 1. **Board Member May Not Have A Close Relative Who Is a Tax Agent or Appraiser**18
- 2. **Board Member Commits a Criminal Offense**.....18
- 3. **Board Member May Not Contract with the Appraisal District or Taxing Unit**.....18
- 4. **Board Member May Not Contract with the Appraisal District or Taxing Unit**.....18
- 5. **Taxing Unit May Not Contract with Board Member**.....19
- 6. **Chief Appraiser Commits a Criminal Offense**.....19
- 7. **Appraisal by Chief Appraiser or Close Relative Is Prohibited**.....19
- 8. **Ex Parte Communications; Penalty**.....19
- 9. **Ex Parte Communications Regarding Appraisal of Property in the District**.....19

E.	NEPOTISM.....	19
	1. Chief Appraiser May Not Employ Close Relative of Board Member.....	20
	2. Chief Appraiser May Not Employ Close Relative.....	20
	3. Individuals Related Within a Prohibited Degree.....	20
	4. Continuous Employment Exception.....	20
	5. Penalties for Violations.....	21
	6. No Compensation for Prohibited Relatives.....	21
F.	ADDITIONAL BOARD OF DIRECTOR RESTRICTIONS.....	21
G.	MISUSE OF OFFICIAL INFORMATION.....	22
H.	COMMON LAW DOCTRINE OF INCOMPATIBILITY.....	22

I. PERSONAL LIABILITY

Lawsuits against board of director members and chief appraisers for damages are remote. The Tax Code provides a detailed mechanism for due process consistent with the Texas and United States Constitutions for contesting a property tax assessment with administrative review by the appraisal review board.¹ The Tax Code provides the exclusive administrative and judicial remedies for contesting a property tax assessment including appraised value and exemptions.² Moreover, the provisions for trial de novo judicial review of appraisal review board determination serve to eliminate most collateral constitutional attacks.³

However, the appraisal district can be a labor and technology intensive organization and therefore litigation involving employment and contract matters should not be unexpected. Lawsuits for damages or violation of civil rights against board of director members, chief appraisers and appraisal review board members in connection with the appraisal of property or the administration of exemptions are uncommon since the chief appraiser and the appraisal office perform the appraisal function and administer exemptions.

Additionally, the Federal Tax Injunction Act bars taxpayer suits in Federal Court against the appraisal district, the board of directors and the chief appraiser relating to property tax matters. The Act prohibits injunctive or declaratory relief for state tax matters in the federal courts unless the state law fails to have a speedy and efficient remedy. The Texas courts have repeatedly held that the Property Tax Code also provides such a remedy.⁴ As a result, board of director members and chief appraisers should not expect to be sued unless personally involved in some action or policy that is a violation of civil rights under 42 U.S.C. § 1983 or is a violation of some other state statute outside the Property Tax Code.

While it is not uncommon for the appraisal district to be sued by a property owner seeking judicial review of a determination by the appraisal review board of a taxpayer protest, an individual board of director involved in a decision making process may become a defendant in a lawsuit. When a board member is sued in the member's "official capacity," it is essentially the same as a suit against the appraisal district. However, when a board member is sued in the member's "personal capacity," it represents a claim that the individual has taken illegal actions under color of law for which the board member should be held personally liable.

Most appraisal districts maintain public official liability insurance or participate in a risk pool for similar coverage, such as the Texas Municipal League Intergovernmental Risk Pool. The coverage typically pays for the legal costs to defend individuals sued in their official capacity, as well as payment of any damages for covered claims. The scope of coverage, often excluding certain claims, such as defamation, intentional torts and "takings." If the claims alleged claims do not fall within coverage, legal costs may still be covered, but any awarded damages would be the board member's personal responsibility.

¹ *Brooks v. Bachus*, 661 S.W.2d 288 (Tex. App.--Houston [11th Dist.] 1983, writ ref'd n.r.e.).

² See TEX. TAX CODE § 42.09; *Dallas County Appraisal Dist. v. Lal*, 701 S.W.2d 44 (Tex. App.--Dallas 1985, writ ref'd n.r.e.).

³ *Keggereis v. Dallas Cent. Appraisal Dist.*, 749 S.W.2d 516 (Tex. Civ. App.--Dallas 1988, no writ).

⁴ *Nat'l Private Truck Council, Inc. v. Ok. Tax Comm'n*, 5 U.S. 582, 115 S.Ct. 2351 (1995).

A. IMMUNITIES FROM SUIT AND LIABILITY IN PERSONAL CAPACITY

Fortunately, in most cases, immunity protects chief appraisers and board members from the imposition of personal liability. Immunity providing that board members and chief appraisers may not be questioned or deposed, may not be hauled into court, and may not be liable for certain decisions – even if those decisions resulted in injury to the complaining party. Immunity exists based on the theory that the good accomplished in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual.⁵

Board members and chief appraisers enjoy both qualified immunity and official immunity. Qualified and official immunity provide the same protection; the federal law shield is simply referred to as “qualified immunity,” while protection from state law claims is referred to as “official immunity.” Both qualified and official immunity require that government officials’ actions be reasonable and comport with clearly established laws.

1. FEDERAL COURT QUALIFIED IMMUNITY

Board members, chief appraisers and appraisal review board members are entitled to qualified immunity. The doctrine of qualified immunity protects public officials against the risk of trial and personal liability for the consequences of actions taken to carry out duties, as long as there is no violation of a well-established law.⁶ Qualified immunity provides freedom from suit and liability to those officials performing discretionary functions, unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known:⁷

At the time the challenged action occurred, the Federal law prescribing it must have been clearly established, that not only as an abstract manner, but also in a more particularized sense such that contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.⁸

Thus, qualified immunity protects all but “the plainly incompetent or those who knowingly violate the law.”⁹ The qualified immunity analysis focuses upon the objective reasonableness of the action in question, in light of legal principles clearly established at the time of the action.¹⁰ This “reasonableness” test sets forth a purely objective determination; thus, the subjective interest or motive of the officials being sued is irrelevant.¹¹

When performing this qualified immunity analysis, courts look to preexisting statutory law, as well as case law established by the United States Supreme Court and the Circuit Courts

⁵ *Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 143 (Tex. App.--Corpus Christi 1986, writ denied).

⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982).

⁷ *Guanaco v. State of Tex.*, 65 F.3d 467, 473 (5th Cir. 1995).

⁸ *Pierce v. Smith*, 117 F.3d 866, 871 (5th Cir. 1997).

⁹ *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534 (1991).

¹⁰ *Johnson v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994).

¹¹ *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 334 (1998).

of Appeal. The requirement that a law be clearly established before qualified immunity will be waived provides assurance that local officials do not have to be studied in current constitutional law in order to be protected. Board members will have qualified immunity from suit and liability, unless all reasonable board members would have known that the actions in question were illegal.

For example, in *McKibben v. Titus County Appraisal District, et al*, a former chief appraiser for a county tax appraisal district filed suit against the appraisal district and its board of directors alleging that she was wrongfully terminated and that the board of directors deprived her of rights in violation of 42 U.S.C. § 1983.¹² The court held that the individual board members were personally liable and were not protected by the doctrine of qualified immunity because they terminated the plaintiff as a result of filing for bankruptcy.¹³ The court determined that the board's action violated Section 525 of the Bankruptcy Code, which provided that "a governmental unit may not terminate the employment of, or discriminate with respect to employment against a person that is or has been a debtor under this title, solely because such debtor is or has been a debtor under this title."¹⁴ The actions taken by the board of directors in *McKibben* violated clearly established law and thus, qualified immunity did not protect board members from personal liability.

EXAMPLE: Board of directors removes a member from the appraisal review board because the member is publicly critical of the appraisal district and for reporting an alleged violation of law to law enforcement authorities ("whistle blower"). The former appraisal review board member sues the appraisal district for violation of civil rights for exercising the member's first amendment right to free speech. Qualified immunity will not protect the individual board member because it is clearly established law that an official may not be removed from an appointed position because of the exercise of free speech.

EXAMPLE: Chief appraiser follows a statute which deprives taxpayer of the right to file a motion to correct the appraisal roll pursuant to Section 25.25(d) of the Tax Code because the taxpayer fails to pay the required amount of taxes under Section 42.08 of the Tax Code before the delinquency date. The taxpayer later successfully challenges the constitutionality of Section 42.08 and the court declares the statute unconstitutional. The chief appraiser would be entitled to qualified immunity because the chief appraiser could not have known that the courts would later declare Section 42.08 unconstitutional.

2. STATE COURT OFFICIAL IMMUNITY

Official immunity is a state common law defense that protects government officers and employees from liability in state claims.¹⁵ Government officials are entitled to official immunity from suit arising from the performance of their discretionary duties, if they have acted within

¹² 233 B.R. 378 (Bankr. E.D. Tex. 1999).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Neimes v. Ta*, 985 S.W.2d 132 (Tex. App.--San Antonio 1998).

their scope of authority and in good faith.¹⁶ “Discretionary duties” require personal deliberation, decision, and judgment.¹⁷ The “good faith” requirement is satisfied when a reasonable and prudent person in the same or similar circumstances would have taken the same actions.¹⁸ Government officials act within the scope of their authority when discharging duties generally assigned to them.¹⁹ Thus, board members and chief appraisers performing discretionary duties in good faith and within the scope of their authority are entitled to official immunity.

EXAMPLE: The chief appraiser inspects property for purposes of an appraisal. The property owner sues the appraisal district and the chief appraiser personally for trespass. The chief appraiser is entitled to official immunity since the official was acting in the good faith exercise of discretionary duties.

B. CAUSES OF ACTION TYPICALLY BROUGHT AGAINST INDIVIDUALS

1. VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983

The majority of lawsuits against board members in their individual capacity are brought under 42 U.S.C. § 1983. In order to establish a cause of action under 42 U.S.C. § 1983, a plaintiff must prove: (1) that a violation of rights secured by the constitution or laws of the United States has occurred; and (2) that the alleged deprivation was committed by a person acting under color of state law.²⁰

EXAMPLE: The board of directors terminates the chief appraiser’s employment for political reasons for campaigning for opponents of a board member who is a local elected official. This is a violation of the First Amendment’s Free Speech provision.

EXAMPLE: The board of directors mandates that the chief appraiser apply an appraisal practice which discriminates against persons on the basis of race, religious beliefs or economic status.

EXAMPLE: The board of directors directs the chief appraiser to not provide notice of appraisal value for properties which are increased more than \$1,000 in value from previous year to avoid protest hearings.

The plaintiff must first identify a life, liberty, or property interest, and then identify a state action taken by an official that resulted in deprivation of that interest. For example, the right to use the administrative procedures of the Tax Code is a “species of property” protected by the Due Process Clause.²¹

¹⁶ *Harris County v. Garza*, 971 S.W.2d 733, 736 (Tex. App.--Houston [14th Dist.] 1998).

¹⁷ *City of El Paso v. W.E. Webb Invs.*, 950 S.W.2d 166 (Tex. App.--El Paso 1997).

¹⁸ *Heikkila v. Harris County*, 973 S.W.2d 333 (Tex. App.--Tyler 1998).

¹⁹ *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

²⁰ *Leffall v. Dallas Ind. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994).

²¹ *See Bank of America v Dallas Cent. Appraisal Dist.*, 765 S.W.2d 451 (Tex. App.--Dallas 1988).

Once a plaintiff has established a protected property right, the plaintiff may allege a violation of substantive due process, procedural due process, or both. A violation of procedural due process arises when, with regard to protected property rights, an individual deprives a property owner of the processes to which they are guaranteed under state law.²² In certain circumstances, these protected processes would include the right to a public hearing, notice, and timely considerations. In virtually all appraisal district cases, providing notice and an opportunity to be heard satisfies procedural due process.²³

The basis of a substantive due process claim is that a decision by a governmental entity or individual is “clearly arbitrary and unreasonable, having no substantive relationship to the public health, safety, morals, or the general welfare.” A plaintiff must assert that the board of directors’ decision was not reasonable and did not have any substantive relationship to the health, safety, morals, or the general welfare of the public.

In equal protection claims, the plaintiff must prove that he or she was treated differently than others similarly situated without any reasonable basis. Except in cases alleging discrimination against a suspect class (race, sex, ethnicity, etc.), equal protection claims are subject to the same “rational basis” test as substantive due process claims.²⁴ Thus, if the action or inaction is rationally related to a legitimate state interest, the equal protection claims must fail. A plaintiff may bring an equal protection claim without being a member of a suspect class, but must prove the discrimination was motivated by ill will or illegal animus.

2. SLANDER AND LIBEL

Board members and chief appraisers may be exposed to personal liability for communications that defame others. The tort of libel concerns written defamation, while slander applies to verbal defamation. “Slander” is defined as a defamatory statement that is orally communicated or published to a third person without legal excuse.²⁵ “Libel” arises when false or defamatory statements are published about an individual.²⁶ Since libel and slander arise under Texas law, official immunity applies to these torts.

To recover under either theory of defamation, a plaintiff must prove that the statement was defamatory and made with actual malice – with knowledge of its falsity or with reckless disregard as to its truth.²⁷ While a determination of whether certain statements or publications are defamatory rests largely on the particular facts of the case, certain communications may be libelous or slander *per se*.²⁸ A false statement that charges a person with a commission of a crime or an implication of sexual misconduct would constitute slander *per se*.²⁹

²² *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487 (1985).

²³ *Tex. Pipeline v Anderson*, 100 S.W.2d 754 (Tex. Civ. App.--Austin 1937, writ ref’d), *cert. denied*, 302 US 724 (1937)); *Brooks v Bachus*, 661 S.W.2d 288 (Tex. App.--Houston [11th Dist.] 1983, writ ref’d n.r.e.).

²⁴ *Richards v. Tex. A&M Univ. Sys.*, 131 S.W.3d 550 (Tex. App.--Waco 2004, pet. denied).

²⁵ *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995).

²⁶ *Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467 (Tex. App.--Dallas 1994, writ denied).

²⁷ *Randall's*, 891 S.W.2d at 640.

²⁸ *Fields v. Worsham*, 476 S.W.2d 421 (Tex. Civ. App.--Dallas 1972, writ ref’d n.r.e.).

²⁹ *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984); *Marshall v. Mahaffey*, 974 S.W.2d 942 (Tex. App.--Beaumont 1998).

EXAMPLE: Board of directors terminates employment of chief appraiser and an individual board member states during the meeting at which the action is taken that the chief appraiser was terminated because of criminal activity. The former chief appraiser sues an individual board member for defamation for damages to the chief appraiser's reputation.

ABSOLUTE PRIVILEGE. In most instances, an absolute privilege will apply to protect public officials from claims of libel or slander. Whether this privilege applies hinges primarily upon the circumstances under which the alleged defamatory communication was made. Communications that are "absolutely privileged" may not form the basis of a civil action of libel or slander.³⁰

Where there is an absolute privilege, no action and damages for language, oral or written, will lie, and this is true even though the language is false and uttered or published with express malice.³¹

If the absolute privilege exists, the falsity or malice of the statement is immaterial and immunity from suit and liability will apply. For example, in *Town of South Padre Island v Jacobs*, the jury found that a memorandum adopted by the Town Aldermen was libelous and published with actual malice.³² Despite this, the court held that the city manager was absolutely immune for the statements since the city manager made the statements at a public meeting and within the scope of his employment.

Texas courts have also consistently found that the meetings of city councils are quasi-judicial proceedings.³³ In a quasi-judicial proceeding, virtually any utterances made by an official while acting in the due course of the proceeding are considered absolutely privileged. Thus, communications made during the course of a meeting of the board of directors may be absolutely privileged.

3. OPEN MEETING ACT VIOLATIONS

Board members and chief appraisers are involved in meetings subject to the Texas Open Meetings Act and may potentially expose themselves to civil or criminal personal liability³⁴:

- (A) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
 - (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;

³⁰ *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912 (1942).

³¹ *Id.*

³² 736 S.W.2d 134, 143 (Tex. App.--Corpus Christi 1986, writ denied).

³³ *Village of Bayou Vista v. Glaskox*, 899 S.W.2d 826, 829 (Tex. App.--Houston [14th Dist.] 1995, no writ); *Town of South Padre*, 736 S.W.2d at 143.

³⁴ TEX. GOV'T CODE § 551.001, *et seq.*

- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
 - (3) participates in the closed meeting, whether it is a regular, special, or called meeting.
- (B) An offense under subsection (a) is a misdemeanor punishable by:
- (1) a fine not less than \$100 or more than \$500;
 - (2) confinement in the county jail for no less than one month or more than six months; or
 - (3) both the fine and confinement.

TEX. GOV'T CODE § 551.144. It is a defense to prosecution that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation contained in an opinion of a court of record, the Attorney General or the attorney for the governmental body. Board members who plan to participate in a closed meeting should obtain an opinion from their legal counsel that the closed meeting is authorized. In addition to the potential for criminal liability, any individual who, without lawful authority, knowingly discloses to a member of the public the certified agenda or tape recording of a session that was closed to the public, commits a criminal offense, and may be liable in a civil suit to any person injured or damaged by the disclosure. TEX. GOV'T CODE § 551.146.

The Texas Court of Criminal Appeals applies the criminal liability provisions of the Texas Open Meetings Act very liberally to public officials.³⁵ The court held that criminal liability may apply to an official even if the official did not knowingly violate the law. The court interpreted the Open Meetings Act to require only knowing participation in a meeting, regardless of whether the member actually knew that that a violation was occurring.³⁶ Clearly, this places an incredible burden upon officials taking part in public meetings to be aware of the parameters under which they may conduct the meeting. While the San Antonio court has surprisingly applied a “no intent” standard to violations of the Act, that will hopefully be restricted by future legislation. It is currently in the interest of public officials involved in public meetings to educate themselves on the proper conduct of meetings under the Texas Open Meetings Act.

(a) GUIDELINES UNDER THE OPEN MEETINGS ACT

Purpose: The Open Meetings Act codified at Chapter 551 of the Texas Government Code is designed to provide public access to meetings of governmental bodies except in certain limited instances.

General Rule: Every regular, special or called meeting of a governmental body is open to the public unless a closed meeting is authorized by the Act.

Minutes: The board must prepare and retain minutes or a tape of each of its meetings. The minutes state the subject matter of each deliberation, vote, order, decision, or other action and are available to the public.

³⁵ *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

³⁶ *Id.* at 587.

Videotaping: The public has a right, subject to reasonable access, to videotape open meetings.

Citizen Appearance: The Open Meetings Act does not grant the public the right to speak at or to control public meetings. If the board allows the public to speak, it must do so in a nondiscriminatory matter. The public may have a right to speak on a particular item if a statute explicitly provides such a right such as a public hearing for the budget.

Meetings Subject to the Act: The Open Meetings Act applies to any discussion or deliberation among a quorum (majority) of the board members, or between a quorum of the members and another person about public business or policy which the members control or supervise, or during which formal action is taken. "Deliberation" is defined as a verbal exchange during a meeting among a quorum of the board members or between a quorum of the members and another person concerning public business or policy.

1. **Conventions, Seminars, Social Meetings:** The Open Meetings Act does not prohibit a quorum of the board of directors or the appraisal review board to attend: (1) social meetings (purely social in nature) unrelated to public business; or (2) conventions, seminars or workshops if no formal action is taken and any discussion of public business is incidental.

2. **Subcommittees:** Committees consisting of board members even though less than a quorum are subject to the Act when the committee meets to discuss public business.³⁷ Although a committee less than a quorum may not bind the board of directors or the appraisal review board, the public is deprived of access to the decision making process if the board of directors or the appraisal review board becomes the rubber-stamp of the committee.

3. **Video Conference Call Meetings:** Texas Government Code Section 551.127 provides that the board of directors or the appraisal review board may use a video conference for a meeting, with the following limitations:

- a. A quorum of the body must be physically present at one location;
- b. The notice requirements must be met and the notice must state where the quorum will be physically present during the meeting and the location of every other member participating in the video conference;
- c. The notice must state each location open to the public during the open portion of the meeting;
- d. An audio record must be made of the meeting and it must be made available to the public;
- e. The open portions of the meeting must be open to the public at each location; and
- f. Each location must have two-way communication with each other location during the entire meeting.

³⁷ Tex. Att'y Gen. Op. No. H-3 (1973); Tex. Att'y Gen. Op. No. H-238 (1974).

The board of directors or the appraisal review board may allow members of the public to testify from a remote location even if a board member is not at that location.

4. Telephone: Except institutions of higher education under limited circumstances, the Act prohibits a meeting of a governmental body by telephone or video conference.³⁸ Board members may not deliberate by telephone (contact members by telephone for the purpose to arrive at a decision or consensus concerning public business).

5. Consultation Between Governmental Body and Its Attorney: Texas Government Code Section 551.129 authorizes consultations between a governmental body and its attorney by telephone conference call, video conference call, or internet communication in the context of a meeting subject to the Open Meetings Act, unless the attorney is an employee of the governmental body. An attorney is an employee of the governmental body if the government body deducts employment taxes from the attorney's compensation. TEX. GOV'T CODE § 551.129(e). A governmental body may conduct a public consultation with its attorney in an open meeting or a private consultation with its attorney in a closed meeting by these means. *Id.*

Notice: The board of directors and the appraisal review board must give seventy-two (72) hours prior written notice of the date, hour, place and subject of each meeting, including authorized closed meetings, with the exception of a closed meeting for conference with an employee or consultation with an attorney relating to matters in which the duty of the attorney to the board of directors and the appraisal review board under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflict with the Act (board member seeks legal advice from the attorney concerning a matter on the meeting agenda or which arises during the meeting and a closed meeting is necessary to protect the attorney-client privilege).

1. Place: A political subdivision extending into multiple counties shall: (1) post notice of each meeting at a place convenient to the public in the administrative office of the appraisal district; (2) provide notice of each meeting to the Secretary of State (who shall then post the notice on the Internet) (if four or more counties); and (3) provide notice of each meeting to the county clerk of the county in which the administrative office of the appraisal district is located (county clerk posts notice).

2. Time: Notice must be posted in a place readily accessible to the public at all times (do not lock building if notice inside) for at least seventy-two (72) hours before a scheduled meeting except for emergency meetings.

3. Content: Notice must be sufficient to inform the public of the subject matter that the board of directors and/or the appraisal review board will consider in an open or closed meeting. The more critical the topic, the more specific the notice. General descriptions such as "new business," "old business," "personnel" or "litigation" are insufficient. Whether a notice is sufficient is a question of fact to be determined on a case by case basis.

Emergency Meetings: The Open Meetings Act permits the board of directors and the appraisal review board to conduct emergency meetings which are subject to different time and

³⁸ Tex. Att'y Gen. Op. No. JM-584 (1986).

notice requirements. There must be an emergency – an imminent threat to the public health or safety or a reasonably unforeseen situation requiring immediate attention. Destruction of the appraisal district building by a tornado would qualify, while consideration of a settlement offer relating to litigation would not constitute an emergency. Failure to post notice on time or the governmental body's delay in taking necessary action does not constitute an emergency.

Notice must be posted in the usual places at least two (2) hours before the scheduled meeting and must clearly state the urgent public necessity or emergency. An emergency item can be added to the agenda of a previously scheduled meeting by posting a supplemental notice, but non-emergency items cannot be added to emergency meeting agenda with less than seventy-two (72) hour notice. Notice must be given by telephone or telegraph to news media previously requesting notice and agreeing to pay the cost of providing the notice.

Final Action: Actual resolution or decision of an ultimate issue confronting the board of directors and the appraisal review board must be made in open session (*i.e.*, open meeting held in compliance with the Act). The board of directors and the appraisal review board may not take action by written agreement without a meeting or vote in open meeting by secret written ballot.³⁹

Enforcement: Any action taken by the board of directors or appraisal review board, as the case may be, in violation of the Open Meetings Act is voidable. Such action may be set aside by a court of competent jurisdiction. TEX. GOV'T CODE § 551.141. Any interested person, including a member of the news media may bring an action for mandamus or injunction to prevent a violation or threatened violation of the Act. In such action, the court may assess the cost of litigation and reasonable attorneys' fees incurred by the prevailing party. Any action taken in violation of the Act may be cured by subsequent properly held meeting.

Remedies and Criminal Violations: Any board member or group of members who knowingly conspire to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations, commit a misdemeanor offense punishable by a fine of not less than \$100.00 or more than \$500.00, and/or confinement in the county jail for not less than one month or more than six months.

A board member who knowingly calls or aids in calling or organizing the unauthorized closed meeting; closes or aids in closing the meeting to the public, if it is a regular meeting; or participates in the closed meeting, commits a misdemeanor offense punishable by a fine of not less than \$100.00 nor more than \$500.00 and/or confinement in the county jail for not less than one month or more than six months.

A board member commits a Class C misdemeanor offense if the member participates in a closed meeting of the board, knowing that a certified agenda of the closed meeting is not being kept or that a tape recording of the closed meeting is not being made.

A board member or any individual who without lawful authority knowingly discloses to a member of the public the certified agenda or tape recording of a meeting that was lawfully closed

³⁹ Tex. Att'y Gen. Op. No. JM-120 (1983); Tex. Att'y Gen. Op. No. H-1163 (1978).

to the public under the Act commits a Class C misdemeanor and is liable to the person who is injured or damaged by the disclosure for actual damages, including damages for personal injury, lost wages, defamation, mental or emotional distress; reasonable attorneys' fees and court costs; and at the discretion of the court, exemplary damages. It is a defense to the criminal charge that such person had good reason to believe the disclosure was lawful. It is a defense to a claim for damages that the disclosure was a result of a mistake concerning the nature or content of the certified agenda or tape recording.

Confidentiality: Although the Act prohibits any person from making public the certified agenda or tape recording of the closed meeting, the Attorney General has opined that the Act does not prohibit board members or other persons in attendance at an executive session or closed meeting from making public statements about the subject matter of that session.⁴⁰ The board or other persons in attendance at an authorized closed meeting should avoid making public statements about the subject matter of the session so as not to injure or damage any person or party affected. Further, each board member and any person in attendance of an authorized closed meeting should respect the privilege afforded to the board to conduct a closed meeting. If board members or those in attendance of an authorized closed meeting do not intend to keep the matter privileged and confidential, then the board should not deliberate in a closed meeting.

(b) CLOSED OR EXECUTIVE SESSIONS

(1) PROCEDURE FOR CLOSED SESSIONS

1. A quorum convenes in open meeting for which proper posted notice is given.
2. The presiding officer announces that a closed meeting will be held and states the applicable sections of the Texas Government Code and the subject matter.
3. Attendance should be limited to persons necessary for the purpose of the executive session and should include board members unless a conflict exists (*i.e.*, one official suing the board).
4. A certified agenda or tape recording must be kept. If the board uses a certified agenda, the presiding officer must certify that the agenda is a true and correct recording of proceedings. The certified agenda must include an announcement at beginning and end of meeting stating the date and time, and the subject matter and any action taken.

The board is required to preserve the certified agenda or tape recordings of a closed meeting for at least two (2) years after the date of the meeting. If an action involving the meeting is brought within that period, the board must preserve the certified agenda or tape while that action is pending. The certified agenda may not be released to the public except by court order.

5. The presiding officer closes the closed meeting and reconvenes the open session. Any action resulting from the closed session must be made in the open session. No final action,

⁴⁰ See Tex. Att'y Gen. Op. No. JM-1071 (1989).

decision, or vote may be made except in an open meeting. No straw votes are allowed in closed session; however, a board member may express an opinion or indicate how he or she will vote.

(2) **MOST COMMON CLOSED MEETINGS**

Consultation With Attorney – Texas Government Code § 551.071 - The board may conduct a closed meeting when the board seeks the advice of its attorney about pending or contemplated litigation or a settlement offer; or on a matter in which the duty of the attorney to the Board of Directors or Appraisal Review Board under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this Act. When the board seeks the advice of its attorney about pending or contemplated litigation or a settlement offer, the notice should describe the lawsuit, claim or subject matter with enough detail to alert the public as to the topic of consideration. It is not necessary to state all consequences which may flow from any consideration of the topic.

NOTICE EXAMPLE:
Executive Session
Convene Executive Session

(A) § 551.071 of the Texas Government Code - Consultation with Board Legal Counsel
(1) pending litigation - *ABC, Inc. v. Dallas Central Appraisal District*;
(2) settlement offer - *ABC, Inc. v. Dallas Central Appraisal District*.

If during the course of a meeting, a situation arises in which the board seeks legal advice and in order to preserve the attorney/client privileged communication, the board may convene a closed meeting to seek legal advice even though not listed on the meeting agenda. However, we recommend routinely including the following language on meeting agendas:

“As authorized by Section 551.071(2) of the Texas Government Code, this meeting may be convened into closed Executive Session for the purpose of seeking confidential legal advice from the Board Legal Counsel on any item listed herein.”

Deliberation Regarding Real Property – Texas Government Code § 551.072 - The board of directors may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental affect on the position of the board of directors in negotiations with a third person.

NOTICE EXAMPLE:
Executive Session
Convene Executive Session

§ 551.072 of the Texas Government Code - deliberation regarding real property
(1) Acquisition of building for appraisal office.

Personnel Matters – Texas Government Code § 551.074 - The board of directors and the appraisal review board may conduct a closed meeting to deliberate the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee or to hear a complaint or charge against an officer or employee subject to their control. If the officer or employee who is the subject of the deliberation or hearing requests a public hearing, it must be open. The closed meeting pursuant to this section is limited to employees of the governmental body and public officers. Public officers include appointed persons who have more than advisory capacity. Examples of public officers include board of directors, the chief appraiser, and members of the appraisal review board. The notice posted for a closed meeting for personnel matters must describe the subject matter and the affected officer or employee.

NOTICE EXAMPLE:

Executive Session
Convene in Executive Session

§ 551.074 of the Texas Government Code - Personnel Matters

- (1) Review of Chief Appraiser.
- (2) Appointment of Appraisal Review Board member.

Deliberation Regarding Security Devices – Texas Government Code § 551.076 - The governmental body may conduct a closed meeting to deliberate the deployment, or specific occasions for the implementation of security personnel or devices.

NOTICE EXAMPLE:

Executive Session
Convene in executive session

§ 551.076 Deliberation regarding security devices

- (1) Deployment of security personnel for the appraisal office.

II. ETHICS

In addition to liability concerns, the board of directors and chief appraisers are often faced with ethical dilemmas. “Ethics” is often defined as the principle of right and good conduct, a system of moral turpitude, or the study of the general nature of morals and the specific moral choices to be made by the individual in his or her relationship with others. Ethical considerations in the decision-making process of public officials are at the forefront of public scrutiny. Even the mere appearance of impropriety impacts the effectiveness of local public officials. Public confidence and respect can best be promoted if public officials, whether paid, unpaid, elected or appointed, uniformly treat all citizens with courtesy, impartiality, fairness and equality under the law and avoid both actual and potential conflicts between their private self-interest and the public trust. State law and the Property Tax Code provide specific rules regarding the conduct of board of director members, chief appraisers and appraisal review board members. Board of director members and chief appraisers are subject to the state law governing conflicts of interest, Chapter 171 of the Texas Local Government Code, the state nepotism laws

under the Texas Government Code and various provisions of the Tax Code. As a result, board members and chief appraisers must be knowledgeable of these laws.

A. ECONOMIC CONFLICTS OF INTEREST – TEXAS LOCAL GOVERNMENT CODE, CHAPTER 171

Chapter 171 of the Local Government Code prohibits a local public official from participating in a vote on a matter involving a business entity or real property 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 or real property. A violation of Chapter 171 does not render an action of the governing body voidable unless the measure would not have been approved without the vote of the person who violated its provisions, but the person who knowingly violates its requirements commits an offense punishable as a Class A misdemeanor.

RULE: A board member commits an offense if the official knowingly participates in a vote or decision on any matter involving a business entity⁴¹ or real property in which the official has a “substantial interest.”⁴²

1. REQUIRED AFFIDAVIT AND ABSTENTION

A board member who has a “substantial interest” in a business entity or real property must file an affidavit with the record keeper revealing the nature and extent of the interest with the board and abstain from further participation on the matter. TEX. LOC. GOV’T CODE § 171.004. “Participation” in the vote or decision for purposes of Chapter 171 includes deliberating about a matter with the other board members. Likewise, Section 171.005 of the Texas Local Government Code requires a separate budget vote on matters in which a member of the board of directors has a “substantial interest.” The affidavit must be filed with the board secretary. *Id.* at § 171.004(b).

2. WHAT CONSTITUTES A SUBSTANTIAL INTEREST?

A “substantial interest” in a business entity (sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law) occurs when:

- (i) the board member owns at least a ten percent (10%) share of the voting stock or shares of the business entity, or owns either at least ten (10%) percent or at least \$15,000 of the fair market value of the business entity; or
- (ii) funds received by the board member from the business entity exceed ten percent (10%) of the official’s gross income for the previous year.

⁴¹ A *business entity* means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law. A *substantial interest* in a business entity means that the member and the member’s spouse together own at least ten percent (10%) of the voting stock or shares in the business, or that either of them is a partner, limited partner, or officer of the business.

⁴² See previous footnote.

Alternatively, a board member has a “substantial interest” in real property if:

- (i) it is reasonably foreseeable that an action on the matter will have a special economic effect distinguishable from its effect on the public; and
- (ii) the board member’s interest is an equitable or legal ownership with a fair market value of \$2,500 or more.

TEX. LOC. GOV’T CODE § 171.002. “Special economic effect” is not defined by the statute, therefore, the board member should file an affidavit and abstain from participation if any economic effect is foreseeable. A board member is also considered to have a prohibited substantial interest if the board member has a substantial interest in an entity that represents another on a matter before the board of directors. For example, the spouse of a board member is representing a contractor seeking approval from the board of directors.

3. SUBSTANTIAL INTEREST EXTENDS TO RELATIVES IN THE FIRST DEGREE

A board member is also considered to have a “substantial interest” if a person related to the board member in the first degree, by either consanguinity or affinity, has a substantial interest in the business entity or the real property under the above tests. Moreover, the affinity relation **continues after death or divorce** if there is a living child of that marriage. TEX. GOV’T CODE § 573.024(b).⁴³

(a) RELATIVES IN THE FIRST DEGREE

<u>Consanguinity</u>	<u>Affinity</u>
Parents	Spouse of those listed under consanguinity
Children	Spouse
	Spouse’s parents
	Spouse’s children
	Stepparents or Stepchildren

(b) RELATIVES IN THE SECOND DEGREE

<u>Consanguinity</u>	<u>Affinity</u>
Grandparents	Spouse of those listed under consanguinity
Grandchildren	Spouse’s grandparents
Sisters & brothers	Spouse’s grandchildren
	Spouse’s siblings

⁴³ Tex. Att’y Gen. Op. No. LO 94-039 (1994).

(c) **RELATIVES IN THE THIRD DEGREE**

<u>Consanguinity</u>	<u>Affinity</u>
Great grandparents	Spouse of those listed under consanguinity
Great grandchildren	Spouse's great grandparents
Aunts & uncles	Spouse's great grandchildren
Nieces & nephews	Spouse's aunts & uncles
	Spouse's nephews & nieces

4. **MAJORITY OF MEMBERS SUBSTANTIALLY INTERESTED**

When a majority of the members of the board are required to file, and do file affidavits, then all board members, including those *substantially interested*, may participate and vote on the matter. TEX. LOC. GOV'T CODE § 171.004(c).

5. **ACTING AS A SURETY PROHIBITED**

A board member is prohibited from acting as surety for any business entity contracting with the appraisal district, or on any official bond.

6. **ACTIONS NOT VOIDED BY BOARD MEMBER'S PARTICIPATION**

An action will be void because of a board member's participation in a decision **only** if that participation is determinative. TEX. LOC. GOV'T CODE § 171.006.

7. **PENALTY FOR FAILING TO FILE OR PARTICIPATING**

Failure to file the affidavit and to abstain constitutes a Class A Misdemeanor, which is punishable of a fine of up to \$4,000.00 and confinement for one year. TEX. PENAL CODE § 12.21.

B. **BANK DEPOSITORY - TEXAS LOCAL GOVERNMENT CODE § 131.093**

The board of directors is required to designate a financial institution at least once every two years as the appraisal district's depository. TEX. TAX CODE § 6.09. Section 131.093 of the Texas Local Government Code provides that a bank is not disqualified from serving as a depository for the district funds if:

- (1) An officer or employee of the political subdivision who does not have the duty to select the political subdivision's depository is an officer, director, or shareholder of the bank; or
- (2) One or more officers or employees of the political subdivision who have the duty to select the political subdivision's depository are officers or directors of the bank or own or have a beneficial interest, individually or collectively, in 10 percent or less of the outstanding capital stock of the bank, if:

- (A) a majority of the members of the board, commission, or other body of the political subdivision vote to select the bank as a depository; and
- (B) the interested officer or employee does not vote or take part in the proceedings.

With respect to conflicts of interest in the selection of depositories, Section 131.903 prevails over the general conflict of interest provision found in Chapter 171 of the Texas Local Government Code.

C. CONFLICTS DISCLOSURE STATEMENT – TEXAS GOVERNMENT CODE, CHAPTER 176

Chapter 176 of the Texas Local Government Code requires that board members disclose certain employment and business relationships with vendors who conduct business with the board or the appraisal district. A “vendor” is any person who enters or seeks to enter into a contract with the board or the appraisal district. The law applies to any written contract for goods or services, including professional services and skilled or unskilled labor. This provision also applies to relationships involving the board member’s family members. A “family member” someone related to the board member within the first degree of consanguinity (blood) or affinity (marriage). Such family members would include spouses, siblings, parents, fathers-in-law, mothers-in-law, sons-in-law, daughters-in-law, and step-children.

A board member must file a conflict disclosure statement if a vendor has contracted with the board or appraisal district or the board or appraisal district is considering doing business with the vendor, and the board member or the board member’s family member has an employment or other business relationship with the vendor that results in the board member or the board member’s family member receiving taxable income of \$2,500 or more in the preceding twelve months. TEX. LOC. GOV’T CODE § 176.003(a)(2)(A). A board member must also file a conflict disclosure statement if the board member or the board member’s family accepts one or more gifts from the vendor that have an aggregate value of more than \$250 in the preceding twelve months. No disclosure is necessary if the gift is given by a family member of the recipient, is a political contribution, or is food, lodging, transportation or entertainment accepted as a guest. *Id.*

A board member shall file the conflicts disclosure statement with the records administrator of the board no later than 5:00 p.m. on the seventh business day after the date on which the board member becomes aware of the facts that require the filing of the statement. The board or appraisal district must then post the statements on its website. A board member who knowingly violates this disclosure requirement commits a Class C misdemeanor, punishable by a fine of up to \$500. It is a defense to prosecution under Subsection (c) that the board member filed the required conflicts disclosure statement not later than the seventh business day after receiving notice of the violation.

The conflicts disclosure statement must include: (1) an acknowledgment that the disclosure applies to each family member of the officer and that the statement covers a twelve-month period; and (2) the board member’s signature acknowledging that the statement is made

under oath under penalty of perjury. The Texas Ethics Commission has conflict disclosure forms available at www.ethics.state.tx.us.

D. PROPERTY TAX CODE

The Property Tax code also provides certain standards and restrictions governing the conduct of the board of directors and chief appraisers. These provisions are in addition to and are more restrictive than Chapter 171 of the Texas Local Government Code.

1. BOARD MEMBER MAY NOT HAVE A CLOSE RELATIVE WHO IS A TAX AGENT OR APPRAISER

A person is ineligible to serve on the board of directors if the person is related within the second degree by consanguinity or affinity to an individual who appraises property for compensation in proceedings under the Tax Code or represents property owners for compensation in proceedings under the Tax Code in the appraisal district. TEX. TAX CODE § 6.035(a).

EXAMPLE: A person cannot be on the board if his parents, children, sisters, or brothers appraise property for property tax purposes or represent property owners in the appraisal district.

2. BOARD MEMBER COMMITS A CRIMINAL OFFENSE

A board member commits an offense if the board member continues to hold office, knowing that an individual related within the second degree by consanguinity or affinity to the board member appraises property or represents property owners for compensation in proceedings under the Tax Code in the appraisal district in which the member serves. TEX. TAX CODE § 6.035(b).

3. BOARD MEMBER MAY NOT CONTRACT WITH THE APPRAISAL DISTRICT OR TAXING UNIT

A person is ineligible to be appointed or to serve on the board of directors if that person or business entity in which the person has a substantial interest is a party to a contract with either the appraisal district or a taxing unit participating in the appraisal district if the contract relates to an activity governed by the Tax Code. TEX. TAX CODE § 6.036(a).

EXAMPLE: A person cannot serve on the board and be a party to a contract for delinquent tax collection services for a participating taxing unit.

4. MAY NOT CONTRACT WITH THE APPRAISAL DISTRICT OR TAXING UNIT

The appraisal district cannot contract with a board member or with a business entity in which a board member has a substantial interest. TEX. TAX CODE § 6.036(b).

5. TAXING UNIT MAY NOT CONTRACT WITH BOARD MEMBER

A taxing unit cannot enter into a contract which relates to an activity governed by the Tax Code with a board member of an appraisal district in which the taxing unit participates or with a business entity in which a member of the board has a substantial interest). TEX. TAX CODE § 6.03(c).

6. CHIEF APPRAISER COMMITS A CRIMINAL OFFENSE

A chief appraiser who refers a person to another person for the purpose of obtaining an appraisal commits an offense. TEX. TAX CODE § 6.035(c).

7. APPRAISAL BY CHIEF APPRAISER OR CLOSE RELATIVE IS PROHIBITED

An appraisal prepared by a chief appraiser in a private capacity or by an individual related within the second degree by consanguinity or affinity to the chief appraiser may not be used in Chapter 41 or Chapter 42 proceedings. TEX. TAX CODE § 6.035(d).

8. EX PARTE COMMUNICATIONS; PENALTY

An appraisal review board member, chief appraiser or appraisal district employee who communicates about specific evidence, argument, facts, merits or property involved in a hearing pending before the appraisal review board in violation of the ex parte communications provisions of Section 41.66(f), faces a Class C misdemeanor. The penalty does not apply to communications between the appraisal review board and its legal counsel or to other communications between the appraisal review board and the chief appraiser. TEX. TAX CODE § 6.411.

9. EX PARTE COMMUNICATIONS REGARDING APPRAISAL OF PROPERTY IN THE DISTRICT

The chief appraiser and directors commit a class C misdemeanor if they directly or indirectly communicate with the other on any matter relating to the appraisal of property in the district, except during an open meeting and for discussions with the appraisal district's attorney regarding litigation when the chief appraiser's presence is necessary in a closed meeting. TEX. TAX CODE § 6.15.

E. NEPOTISM

State law provides that local public officials may not appoint, confirm the appointment of, or vote for appointment or confirmation of appointment of an individual to a position which will be directly or indirectly compensated from public funds if that individual is related to the public official within the third degree by consanguinity or second degree by affinity. TEX. GOV'T CODE § 573.041. For example, the board of directors may not appoint the brother, sister, spouse of a board member as the chief appraiser or as an appraisal review board member. The

state nepotism statute applies to the chief appraiser.⁴⁴ Thus, the chief appraiser is subject to the same restrictions under Chapter 573 of the Texas Government Code. TEX. TAX CODE § 6.05(g).

1. CHIEF APPRAISER MAY NOT EMPLOY CLOSE RELATIVE OF BOARD MEMBER

The chief appraiser may not employ an individual related to a member of the board of directors within the second degree by affinity or within third degree by consanguinity. TEX. TAX CODE § 6.05(f).

2. CHIEF APPRAISER MAY NOT EMPLOY CLOSE RELATIVE

The chief appraiser may not employ or contract with an individual or the spouse of an individual who is related to the chief appraiser within the first degree by consanguinity or affinity. TEX. TAX CODE § 6.05(g).

3. INDIVIDUALS RELATED WITHIN A PROHIBITED DEGREE

“Consanguinity” denotes a blood relationship – one individual is descended from the other or they share a common ancestor. Under the nepotism statutes, the term “child” includes an independent, adult child. Consanguine relationships include those by half-blood and legal adoption. The degree of a relationship by half-blood or by adoption is computed just as though the individuals are related by full blood. Accordingly, a board member is related in the second degree by consanguinity to the daughter of the board member’s half-sister (equivalent to a full-blood niece). On the other hand, a relationship between step-relatives is not consanguine. Thus, a board of directors may appoint a board member’s step-brother unless the board member was also related to the step-brother by affinity.

“Affinity” refers to a relationship created by marriage. Two individuals are related by affinity if they are married to each other or if the spouse of one of the individuals is a blood relative of the other. A relationship by affinity extends only to blood relatives of an individual’s spouse. It does not include a relative-in-law of the individual’s spouse. Accordingly, a board member is related within a prohibited degree to the board member’s spouse, but is not related at all (unless there is some other relationship) to the spouse’s sibling’s spouse. For the purpose of determining the existence of a relationship by affinity, a marriage that has ended in divorce or the death of a spouse generally is considered to continue so long as a child of that marriage lives.

A position paid from public funds or fees of office includes an independent contractor, as well as an officer or an employee.

4. CONTINUOUS EMPLOYMENT EXCEPTION

The nepotism prohibition by Chapter 573 of the Texas Government Code does not apply to an appointment, confirmation of an appointment, or vote for an appointment or confirmation of an appointment of an individual to a position if: (i) the individual is employed in the position immediately before the appointment of the related board of director; and (ii) the prior

⁴⁴ Tex. Att’y Gen. Op. No. JM-72 (1983).

employment is continuous for at least thirty days if the public official is appointed or for six months if the public official is elected. TEX. GOV'T CODE § 573.062. However, the board of directors may not participate in any deliberations or voting on reemployment, compensation, promotion, or dismissal of the relative, employee.

5. PENALTIES FOR VIOLATIONS

A board member who is convicted of violating Chapter 573 of the Government Code will be immediately and summarily removed from office. If the board member is not summarily removed within thirty (30) days after the conviction becomes final, a quo warranto proceeding may be brought to remove the official. In addition to removal, an official who violates the nepotism statutes commits an offense involving official misconduct, a misdemeanor punishable by a fine between \$100 and \$1,000.

6. NO COMPENSATION FOR PROHIBITED RELATIVES

An individual appointed to a position in violation of Government Code Chapter 573 may not be compensated. Section 573.083 forbids the board of directors or the chief appraiser who know the individual is ineligible, to approve payment of compensation.

F. ADDITIONAL BOARD OF DIRECTOR RESTRICTIONS

Board of director members may not appoint:

1. A person to serve on the appraisal review board if the person or a business in which the person has a substantial interest is a party to a contract with the appraisal district or to a contract involving property tax matters with a participating taxing unit. "Substantial interest" means that the member or the member's spouse together own at least ten percent of the voting stock or shares in the business, or that either of them is a partner, limited partner, or officer of the business. TEX. TAX CODE § 6.413; or

2. A person to serve on the appraisal review board who is a relative within the second degree by either consanguinity or affinity is a property tax representative in the appraisal district or is a fee appraiser who performs appraisals for use in property tax proceedings in the appraisal district. TEX. TAX CODE § 6.412.

<u>Relatives</u>	<u>Prohibitions</u>
<p>1st Degree by Consanguinity: Parents Children</p>	
<p>1st Degree by Affinity: Spouse of those listed under Consanguinity Spouse Spouse's parents</p>	<p>If one of them does business in the appraisal district as a paid property tax agent or as a fee appraiser whose work involves property</p>

Spouse's children Stepparents Stepchildren	taxes, the ARB member is ineligible to serve. However, current members may complete their terms.
2nd Degree by Consanguinity: Grandparents Grandchildren Sisters & Brothers	
2nd Degree by Affinity: Spouses of those listed Under Consanguinity Spouse's grandparents Spouse's grandchildren Spouse's siblings	
3rd Degree by Consanguinity/Affinity:	No prohibitions

G. MISUSE OF OFFICIAL INFORMATION

Board members and the chief appraiser have access to information by virtue of their office that has not been made public and should aid another to acquire an interest in any property, transaction, or enterprise that may be affected by the information. TEX. PENAL CODE § 39.06. A board member who uses such information with the intent to obtain a benefit, or to harm or defraud another, may be fined up to \$10,000 and confinement not more than ten years, or less than two years. TEX. PENAL CODE § 12.34.

H. COMMON LAW DOCTRINE OF INCOMPATIBILITY

The common law doctrine of incompatibility prohibits an individual from serving in two offices of conflicting loyalties. An individual may not promote the interest of one position to the detriment of the interests represented by the other position. The doctrine prohibits an individual from occupying two offices where one office might impose its policies on the other or subject it to control in some way. For example, a person may not simultaneously serve as county auditor and councilmember of a city located within that county.⁴⁵ Incompatibility may be overcome by statute when a statute specifically prescribes the composition and/or qualifications of certain positions or boards and the appointing authorities. For example, the county-tax assessor is a nonvoting member of the board of directors, if not appointed to the board, and a member of a governing body of a taxing unit (city council member, county commissioner, school board trustee) is eligible to serve on the board. TEX. TAX CODE § 6.03(a). Service on the board of a river authority is not incompatible with service on the board of directors of the appraisal district that appraises property within the boundaries of the river authority.⁴⁶

⁴⁵ Tex. Att'y Gen. Op. No. JM-133 (1984).

⁴⁶ Tex. Att'y Gen. Op. No. DM-47 (1991).

The doctrine of incompatibility also applies to situations of self-appointment or self-employment. It is incompatible to be both a member of a body making the appointment and an appointee of that body. The attorney general has held that the board of trustees of a community college district may not appoint one of its own as interim chancellor.⁴⁷ Thus, the board of directors may not employ one of its members as appraisal district's legal counsel. Also, the board of directors may not appoint one of its members to the appraisal review board. The chief appraiser may not serve as chairman of the appraisal district board of directors.⁴⁸ Determination of questions concerning incompatibility is fact intensive. Legal counsel should be consulted about potential conflicts under the doctrine of incompatibility.

⁴⁷ Tex. Att'y Gen. Op. No. LO 92-008 (1992).

⁴⁸ Tex. Att'y Gen. Op. No. LO-90-45 (1990).