

Legal Q&A

By Christy Drake-Adams, TML Legal Counsel

Does state law prohibit a city from purchasing or condemning a councilmember's real property?

No. However, the councilmember must disclose his/her interest in the property by filing an affidavit that complies with Chapter 553 of the Government Code, and may also have to file an affidavit that complies with Chapter 171 of the Local Government Code.

Chapter 553 of the Government Code provides that “[a] public servant who has a legal or equitable interest in property that is to be acquired with public funds shall file an affidavit within 10 days before the date on which the property is to be acquired by purchase or condemnation.” TEX. GOV'T CODE § 553.002(a). The term “public funds” is defined to “include[] only funds collected by or through a government.” *Id.* § 553.001(1).

The councilmember may also have to file an affidavit under Chapter 171 of the Local Government Code. Chapter 171 prohibits, among other things, a local public official from voting on or deciding any matter involving real property in which the official has a substantial interest if it is reasonably foreseeable that the action will have a special economic effect on the value of the property, distinguishable from its effect on the public. TEX. LOC. GOV'T CODE § 171.004(a); *see also* Tex. Att'y Gen. Op. No. GA-0796 (2010), at 4 (discussing special economic effect). A local public official 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. TEX. LOC. GOV'T CODE § 171.002(b). A public official who has the required interest must file, before a vote or decision on any matter involving the real property, an affidavit stating the nature and extent of the interest. *Id.* § 171.004(a). In addition, a public official is generally required to abstain from further participation in the matter. *Id.*

Does state law prohibit a city from purchasing or condemning a city employee's real property?

No. However, the employee may have to disclose his/her interest in the property by filing an affidavit under Chapter 553 of the Government Code, Chapter 171 of the Local Government Code, or both.

Chapter 553's affidavit requirement applies to a “public servant,” which is defined to mean a person who is elected, appointed, employed, or designated, even if not yet qualified for or having assumed the duties of office, as: (1) a candidate for nomination or election to public office; or (2) an officer of government. TEX. GOV'T CODE § 553.001(2). Thus, only an employee who is employed as an “officer of government” is subject to Chapter 553.

Chapter 171 applies to a “local public official.” TEX. LOC. GOV'T CODE § 171.001(1). The term “local public official” is defined to mean “a member of the governing body or another officer,

whether elected, appointed, paid, or unpaid, of any . . . municipality . . . who exercises responsibilities beyond those that are advisory in nature.” *Id.* Thus, an employee who is an officer exercising responsibilities beyond those that are advisory in nature is subject to Chapter 171.

Most city employees would not be classified as either a “public servant” or a “local public official.” However, some employees, such as a city manager in certain home rule cities, could be classified as such.

Do the Chapter 553 and Chapter 171 affidavit requirements apply to personal property?

Chapter 553 is not, by its language, limited to real property interests. Thus, if a public servant has a legal or equitable interest in any real (e.g., land) or personal (e.g., a vehicle) property acquired with public funds, and has actual notice of the acquisition or intended acquisition of the property, the public servant should file a Chapter 553 affidavit. TEX. GOV’T CODE § 553.002. On the other hand, Chapter 171 is expressly limited to a situation in which a public official has a legal or equitable interest in real property. TEX. LOC. GOV’T CODE §§ 171.002, .004.

What are the differences between a Chapter 171 and Chapter 553 affidavit?

Chapter 171 and Chapter 553 affidavits differ in: (1) the time in which the affidavit must be filed; (2) the person with whom the affidavit is filed; and (3) the information that is to be included in the affidavit.

When?

A Chapter 553 affidavit has to be filed within ten days before the date on which the property is to be acquired by purchase or condemnation. TEX. GOV’T CODE § 553.002(a).

A Chapter 171 affidavit is to be filed before a vote or decision on any matter involving the real property. TEX. LOC. GOV’T CODE § 171.004(a).

Who?

A Chapter 553 affidavit is filed with the county clerk of the county in which the public servant resides as well as the county clerk of each county in which the property is located. TEX. GOV’T CODE § 553.002(c).

A Chapter 171 affidavit is filed with the official record keeper of the city. TEX. LOC. GOV’T CODE § 171.004(b).

What?

A Chapter 553 affidavit must include: (1) the name of the public servant; (2) the public servant’s office, public title, or job designation; (3) a full description of the property; (4) a full description of the nature, type, and amount of interest in the property, including the percentage of ownership interest; (5) the date the public servant acquired an interest in the property; (6) the following verification: “I swear that the information in this affidavit is personally known by me to be

correct and contains the information required by Section 553.002, Government Code”; and (7) an acknowledgement of the same type required for recording a deed in the deed records of the county. TEX. GOV’T CODE § 553.002(b).

A Chapter 171 affidavit must state “the nature and extent of the interest.” TEX. LOC. GOV’T CODE § 171.004(a).

Affidavit examples are available at www.tml.org/legal_topics/legal_ethics.asp.

Does a councilmember have to file an affidavit if another governmental entity (for example, the county) purchases the councilmember’s property?

The language of Chapter 553 suggests that a public servant is required to disclose his/her interest in property even when the property is to be acquired by a separate governmental entity with which the public servant is not affiliated. Chapter 171’s language suggests that its disclosure and abstention requirements apply to the governmental entity with which the official is affiliated.

We are not aware of a case or attorney general opinion that addresses these issues. Thus, a public servant or official subject to Chapter 553 or Chapter 171 should consult his/her private legal counsel regarding the application of these chapters in this scenario.

What is the penalty for failing to comply with the Chapter 553 and Chapter 171 affidavit requirements?

A person who violates Section 553.002 of the Government Code by not filing the affidavit required is presumed to have committed a Class A misdemeanor offense if the person had actual notice of the acquisition or intended acquisition of the legal or equitable interest in the property. TEX. GOV’T CODE § 553.003. A Class A misdemeanor is punishable by a fine and/or confinement.

If a public official votes on a matter that he or she has a substantial interest in or fails to abstain from further participation, the action of the governing body on the matter is not voidable, unless the matter that was the subject of the action would not have passed without the vote of the person who had a “substantial interest.” TEX. LOC. GOV’T CODE § 171.006. A knowing violation of Chapter 171 is a Class A misdemeanor. *Id.* § 171.003(b).

Because there are criminal penalties associated with a failure to comply with the affidavit requirements of Chapter 553 and Chapter 171, we advise, “When in doubt, fill it out!”