

## **Transportation Policy Council Bylaws Regulatory Compliance**

### **Background**

The Houston-Galveston Area Council was designated by the Governor as the metropolitan planning organization (MPO) for the Houston Transportation Management Area (TMA) in 1974. As such it is subject to federal and state statutes regarding its membership and operations (23CFR450.310 and Ch. 171 and Ch. 176 Texas Local Government Code).

The Transportation Policy Council (TPC) serves as the policy board for the Houston MPO. The bylaws for the TPC were adopted in 1981 and have been amended three times to reflect changing conditions in the TMA.

### **Current Situation**

At the March 2009 TPC meeting, a question was raised regarding the legality of appointing a representative of a private sector, for-profit entity as a voting member of the Council. Attached is a letter from the Houston-Galveston Area Council's legal counsel. It is the opinion of counsel that the federal regulatory statutes and the Texas Local Government Code that the composition of the policy board for a MPO is limited to local public officials. Those officials are defined as local elected officials, officials of public agencies that administer or operate major modes of transportation and appropriate State officials.

TPC members are considered local public officials and are subject to requirements of Chapter 171 of the Texas Local Government Code regulating conflicts of interest of officers of municipalities, counties and certain other local governments. The Texas Transportation Code requires the TPC to have an ethics policy that conforms to the regulations outlined in Chapter 171. TPC bylaws committee, formed earlier this year, will need to meet and develop an ethics policy to reflect this new requirement.

### **Action Required**

For information only.

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**MEMORANDUM**

**TO:** Mr. Steve Howard  
Houston-Galveston Area Council

**FROM:** Kathleen Ellison and Heather De La Garza

**DATE:** April 30, 2009

**RE:** Eligibility of Appointee to HGAC's Transportation Policy Council

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**QUESTIONS PRESENTED**

1. May the Transportation Policy Council appoint representatives from private transportation companies as voting members?
2. Are members of the Transportation Policy Council subject to Chapter 176 of the Texas Local Government Code?
3. Are members of the Transportation Policy Council subject to the disclosure requirements of Chapter 171 of the Texas Local Government Code?
4. Are there any other state laws pertaining to ethics or disclosure that apply to the Transportation Policy Council?

**SHORT ANSWER**

1. No. Only local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan area and appropriate State officials may serve on a metropolitan planning organization.
2. Yes. Read literally, Chapter 176 applies to the TPC, and members of the TPC must file disclosure statements when applicable.
3. Yes. Members of a policy board of a metropolitan planning organization are considered "local public officials" and must comply with Chapter 171 of the Texas Local Government Code.
4. Yes. The Texas Transportation Code requires the TPC to have an ethics policy to prevent a policy board member from having a conflict of interest in business before it. Penal statutes prohibit acceptance of gifts or inducements.

## ANALYSIS

### **I. Eligibility of Appointees to the Transportation Policy Council of the HGAC**

In 1988, the then Governor of Texas (the “*Governor*”) designated the Houston-Galveston Area Council (the “*HGAC*”) as the metropolitan planning organization (the “*MPO*”) for transportation planning in the Houston/Galveston, Texas City, and La Marque area (the “*Houston Area*”). The designation states that HGAC should “use the Committee structure established pursuant to Section 134 of Chapter 1 of Title 23 U.S.C. as the group responsible for giving the Metropolitan Planning Organization overall transportation policy guidance.” Section 134 of Chapter 1 of Title 23 of the United States Code (“*Section 134*”) establishes a metropolitan transportation planning process, in which an MPO, defined as the policy board of an organization created as a result of the designation process,<sup>1</sup> develops long-range transportation plans and transportation improvement programs for a metropolitan planning area.

In accordance with the Governor’s designation and the committee structure of Section 134, HGAC created the Transportation Policy Council (the “*TPC*”). According to TPC’s bylaws, it serves as the “Policy Board for the Metropolitan Planning Organization (MPO) identified in the Governor’s MPO designation.” Since the policy board itself is considered a MPO under Section 134, the TPC is an MPO under Section 134.

Section 134 provides for the composition of an MPO. It states that:

“Each metropolitan planning organization that serves an area designated as a transportation management area, when designated or redesignated under this subsection, shall consist of---

- (A) local elected officials;
- (B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area; and
- (C) appropriate State officials.”<sup>2</sup>

Under principles of statutory construction, the words “shall consist of” connote a mandatory requirement that all members of the MPO be in one of the three categories listed above. Title 23, Chapter 1, Part 450 of the Code of Federal Regulations reiterates the composition requirements in Section 134.<sup>3</sup>

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<sup>1</sup> 23 U.S.C. § 134(b)(2), *see also* 23 CFR § 450.310 (d) (repeating the definition contained in the United States Code and adding that an MPO can expand the participation of local elected officials, public transportation agencies, or appropriate State officials to their policy boards and committees subject to certain federal regulations).

<sup>2</sup> 23 U.S.C. § 134(d)(2).

<sup>3</sup> 23 CFR § 450.310(d).

## **II. Applicability of Conflicts Disclosure Laws to TPC**

Chapter 176 of the Texas Local Government Code ("*Chapter 176*") requires a "local government officer" to file a conflicts disclosure statement with the records administrator of a "local governmental entity" when the local governmental entity enters into or is considering entering into a contract with a person who

has an employment or other business relationship with the local government officer or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12-month period preceding the date that the officer becomes aware that:

(i) a contract has been executed; or

(ii) the local governmental entity is considering entering into a contract with the person; or

has given to the local government officer or a family member of the officer one or more gifts that have an aggregate value of more than \$250 in the 12-month period preceding the date the officer becomes aware that:

(i) a contract has been executed; or

(ii) the local governmental entity is considering entering into a contract with the person.<sup>4</sup>

According to the TPC bylaws, "the membership of the TPC shall be comprised of chief elected official or chief administrative officer, other officials in the case of multiple representation, or their designated representatives of the agencies listed under Voting Membership". The definition of a "local governmental entity" under Chapter 176 includes a board, commission, district, or authority to which a member is appointed by the commissioners court of a county, the mayor of a municipality, or the governing body of a municipality, and a "local government officer" means a member of the governing body of a local governmental entity.

Because the TPC includes some members who are appointed by the commissioners court of a county, the mayor of a municipality, or the governing body of a municipality, it appears to be a local governmental entity under Chapter 176, making all members "local government officers" required to file disclosure statements when applicable.

Whether it was the intent of the Legislature in Chapter 176 to require disclosure statements from all members of a board composed of members, only some of which are appointed by a commissioners court or mayor, is unclear; however, that is the literal reading of

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<sup>4</sup> Tex. Loc. Gov't. Code §176.003(a) (Vernon 2008).

the statute. As stated by the Texas Attorney General in answering questions about chapter 176, we are required to look at the plain meaning of the statute's language:

In construing Chapter 176, we must follow the cardinal rule of statutory construction and determine the legislative intent as discerned primarily from the plain meaning of the words used in the statute. [citations] We look beyond the literal text of the statute only where the language of the statute is ambiguous or would lead to absurd results the legislature could not possibly have intended.<sup>5</sup>

### **III. Applicability of Chapter 171 of the Texas Local Government Code to the TPC**

#### **A. Texas Local Government Code-Chapter 171**

Chapter 171 of the Texas Local Government Code ("*Chapter 171*") requires a "local public official [who] has a substantial interest in a business entity<sup>6</sup> or real property,<sup>7</sup> ...before a vote or decision on any matter involving the business entity or the real property," to file an affidavit with the official record keeper of the governmental entity "stating the nature and extent of the interest and [the official] shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public."<sup>8</sup>

Chapter 171 also requires the "governing body of a governmental entity [to] take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest"<sup>9</sup> and such "affected member may not participate in that separate vote."<sup>10</sup>

#### **B. Texas Transportation Code-Metropolitan Planning Organizations**

Chapter 472, Subchapter D, Section 472.033 of the Texas Transportation Code ("*Chapter 472*") states that a "policy board member is considered a local public official for purposes of

<sup>5</sup> Tex. Atty. Gen. No. GA-0446 (August 2, 2006).

<sup>6</sup> A "substantial interest in a business entity" is defined as (1) the person owns 10% or more of the voting stock or shares of the business entity or owns either 10 % 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% of the person's gross income for the previous year.

<sup>7</sup> A substantial interest in real property is defined as an interest that is an equitable or legal ownership with a fair market value of \$2,500 or more.

<sup>8</sup> Tex. Loc. Gov't Code §171.004(a),(b) (Vernon 2009).

<sup>9</sup> Tex. Loc. Gov't Code §171.005(a) (Vernon 2009).

<sup>10</sup> Tex. Loc. Gov't Code §171.005(b) (Vernon 2009).

Chapter 171, Local Government Code.”<sup>11</sup> Chapter 472 defines (i) “policy board” as a the “policy board of a metropolitan planning organization” and (ii) “metropolitan planning organization” as a metropolitan planning organization designated or redesignated under 23 U.S.C. Section 134.”<sup>12</sup>

The Governor’s designation of the HGAC as an MPO states that the committee structure should be “established pursuant to Section 134 of Chapter 1 of the Title 23 U.S.C. as the group responsible for giving the Metropolitan Planning Organization [the HGAC] overall transportation policy guidance.”<sup>13</sup> The bylaws of the TPC confirm that the TPC is to serve “as the Policy Board for the Metropolitan Planning Organization identified in the Governor’s MPO designation.”<sup>14</sup> As the TPC is considered the “policy board” of the MPO and designated as an MPO under 23 U.S.C. Section 134, its members are subject to the disclosure and voting abstention requirements of Chapter 171.

#### **IV. Applicability of Other Ethics or Disclosure Laws to the TPC**

Chapter 472 requires that the TPC adopt bylaws establishing an ethics policy to prevent a policy board member from having a conflict of interest in business before the MPO.

Penal statutes prohibit acceptance of gifts or inducements by members of the TPC. Section 36.08(d) of the Texas Penal Code states that:

“A public servant who exercises discretion in connection with contracts, purchases, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.”<sup>15</sup>

This section does not apply to several benefits, including a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient, an item with a value of less than \$50, and food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

Section 36.07 of the Texas Penal Code prohibits a public servant from soliciting, accepting, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant’s official position or duties; however, this section does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant

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<sup>11</sup> Tex. Transp. Code §472.033(a) (Vernon 2009).

<sup>12</sup> Tex. Transp. Code §472.031(1),(2) (Vernon 2009).

<sup>13</sup> Governor’s designation, Section I(C).

<sup>14</sup> Transportation Policy Council Bylaws and Operating Procedures, Section A.

<sup>15</sup> Tex. Penal Code §36.08(d) (Vernon 2009).

renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event.

Section 36.02 of the Texas Penal Code states that a person commits an offense if he intentionally or knowingly solicits, accepts or agrees to accept from another any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant.

The ethics policy can easily incorporate these prohibitions.

### CONCLUSION

Federal law requires that the membership of an MPO consist only of local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan area, and appropriate State officials. Chapter 176 of the Texas Local Government Code appears to apply to members of the TPC. Finally under Chapter 472 of the Texas Transportation Code members of the TPC are considered "local public officials" as that term is used in Chapter 171 and must abide by disclosure and voting requirements of Chapter 171. Chapter 472 also requires that the TPC adopt an ethics policy. Penal statutes prohibit acceptance of gifts or inducements by members of the TPC.

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