

**Why Can't We All Just Get Along?**  
**The Relationship between City Council and EDC Board**

**Riley Fletcher**  
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## City Council vs. Economic Development Corporation

### I. What is an Economic Development Corporation?

An Economic Development Corporation (EDC) is a non-profit corporation established by a City for the purpose of supporting economic development within the City. The EDC uses sales and use tax dollars collected (created by an election to collect sales and use tax) to encourage different types of development within the City. See *Tex. Loc. Gov't.* §§ 501.054, 504.052, 505.252.

#### a. Types of EDC's

There are two types of EDC's. **Type A** EDC focuses on funding of land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements for creating jobs in the fields of manufacturing/industrial, research/development, military (including closure and realignment of bases), distribution, recycling, warehouse, and corporate headquarter facilities. See § 505.101. A Type A EDC is more restrictive on how the sales and use tax funds can be spent. *Id.*

**Type B** EDC can be used for all the projects/programs of a Type A EDC plus it can fund projects usually considered to be community development initiatives, including land, buildings, facilities, equipment, infrastructure for professional and amateur sports, parks, entertainment, tourism and affordable housing. See § §505.102-.104. Type B funds can also be used for development of water supply facilities and water conservation programs (if facility is approved by voters). See §§ 505.154, .304.

#### b. Board Membership

EDC funding is overseen by the corporation's Board of Directors and by the City Council. The board membership for each type of EDC is set by statute. A Type A EDC is required to have at least five members with NO statutory criteria for their selection (not required to be residents of the City). A Type B EDC is required to have seven members with certain statutory requirements of residency for their selection (with a few exceptions, required to be residents of the city). However, although number of directors and their terms are governed by statute **the City Council is the governing body that appoints the board members to the EDC board.** Further, EDC Directors have been deemed NOT to be "public officers" for purposes of common-law incompatibility. See *Tex. Att'y Gen. Op. No. JC-0547 (2002)*. This is important because it means that **a city council member can be appointed and serve as a board of director for an EDC of the same City.** See *Tex. Loc. Gov't Code* §§ 504, 505. In addition, city council can vote to

remove an EDC board of director without cause. See Tex. Loc. Gov't Code §§ 504.051 & 505.051.

### **c. EDC Training**

#### **Required of Type A & Type B Corporations per TLGC § 502.101**

Training must be conducted at least once in each 24-month period, the following persons associated with the corporation shall attend a training seminar regarding the operation of a corporation created under this subtitle:

- (1) The municipal attorney, administrator or clerk of the municipality that authorized the creation of the corporation and
- (2) The corporation's executive director or other person responsible for the corporation's daily administration.

### **d. City Council Oversight**

**An EDC once formed will operate based on bylaws passed by the EDC and also approved by City Council.** The bylaws will set the amount of authority the EDC will have on expenditures without seeking city council approval. However, **City Council is required to approve all EDC programs and projects and most expenditures.** Some City Councils give much authority to EDC and just to the legally required oversight. The City Council is required by statute to annually review the EDC's financial statements. Thus, City Council has access to the EDC's books and records at all times. See Tex. Loc. Gov't Code § 501.073. However, while both Type A and Type B EDC's are required to obtain approval by city council of the projects; there is no additional requirement for additional public notice or a public hearing on individual projects by a Type A EDC. Type B EDC's are subject to certain additional procedural requirements including providing public notice of a project and to hold a public hearing prior to pursuing the project and the public has 60 days to petition for an election regarding the project. See Tex. Loc. Gov't Code §§ 504 & 505.

**An EDC is not a part of a political subdivision and its directors are not public officers. The EDC is a separate entity, formed and filed as a non-profit corporation with the Secretary of State, with separate bylaws and board of directors to oversee the operation of the corporation.** However, because the EDC is funded with sales and use tax dollars the city oversight is heavily intertwined with the EDC. The EDC works to benefit the entire city as a separate **entity** and therefore the interests of both entities are usually aligned. However, conflicts arise affecting both the City and EDC...

## **II. Can City funds be used to support an EDC?**

- a. The City may use city funds to support an EDC, in addition to allocating sales and use tax revenue to the EDC.
  - i. **However, there must be a contract granting the use of city funds for economic development purposes as per TLGC § 380.002.**
    - 1. Funds must be used for:
      - a. Diversification of the economy;
      - b. Reduce unemployment and underemployment; and
      - c. Expansion of commerce
    - 2. If public funds granted annually, should approve contract annually.
- b. **If city personnel are being paid by EDC they must be performing EDC duties. A contract between the EDC and the City should be in place if a city employee is performing EDC duties and if an EDC employee is performing city duties.** For example, EDC Director performing city grant writer duties. A contract should require the City to reimburse the EDC or provide “in-kind” services to the EDC (i.e. Agendas, Minutes, accounting, office space, etc.) The use of EDC funds must be for EDC purposes and not city purposes (sometimes the same, other times not the same).
- c. **City can issue bonds in support of EDC project?** Yes, but a contract needs to be created between the EDC and City outlining that the EDC is responsible for payments towards the project’s debt. The contract needs to define responsibilities of the parties, finance costs including timeline for debt service payments and identify where EDC funds are coming from and how to be used to pay off the city debt for the project.
- d. **Can city Property Tax revenues be used to back up EDC project bond payments?** No. Only the proceeds of the sales and use tax imposed can be used to fund EDC projects paid for by bonds. Per TLGC §505.302, the proceeds of the sales and use tax may be used to: (1) pay the costs of projects; 2) pay the principal, interest and other costs relating to bonds or other obligations issued by the EDC.

### III. **EDC Bylaws regarding contracts between the City and the EDC**

- a. EDC Bylaws should have a provision that the entity may contract with the City or with another entity, for administrative services.
- b. Contract should be in place and approved annually.

- c. EDC has ultimate decision-making authority as to who it contracts with for administrative services...however some EDC's must get Council approval for these contracts.

#### IV. Is the EDC a Governmental Unit?

- a. **No.** An EDC is either a Type A or Type B economic development corporation created under the Act. Section 501.055(b) of the Act states that “[a] corporation is not a political subdivision . for purposes of the laws of this state.” Tex. Loc. Gov't Code Ann. § 501.055(b). Thus, an EDC does not qualify as a governmental unit under Texas Civil Practice and Remedies Code section 101.001(3)(B). See Tex. Civ. Prac. & Rem.Code Ann. § 101.001(3)(B). Moreover, an EDC does not meet any of the other definitions of governmental units in section 101.001(3). See id. § 101.001(3)(A), (C), (D).
- b. Although an EDC does not meet the definitions in Texas Civil Practice and Remedies Code section 101.001(3), **it may be considered a governmental unit for certain purposes** under section 505.106(b) of the Act.
- c. **Tort Claims** - *City of Weslaco v. Borne*, 210 S.W.3d 782 (Tex.App.-Corpus Christi 2006, pet. denied).
- d. **Breach of Contract Claims** – *City of Leon Valley EDC v. Larry Little*, 422 S.W.3d 37 (Tex.App.-San Antonio 2017, pet. denied).

#### V. What types of conflicts?

- a. There have been conflicts between City's and their EDC's involving:
  - i. competing views on proposed projects;
  - ii. competing views over contracts signed by EDC's that are subsequently not approved by City Council;
  - iii. over cost sharing on infrastructure and developer incentives; and
  - iv. interpretation of existing agreements and obligations.
- b. If the City Attorney represents both the City and the EDC, no problem if both entities are aligned. How long will that last? When the City's and EDC's positions are not aligned, the City Attorney has an ethical dilemma because the City Attorney has been providing legal counsel to both entities as part of the duties as the City Attorney. Who does the City Attorney represent now? What entity is the client now? How does the City Attorney proceed?

#### VI. Where does the City Attorney stand when there is a conflict between the City and the EDC?

**a.) Who is the client?**

The city attorney, whether working for city as in-house counsel or outside contract attorney must ask who he or she represents. As a city attorney you can take direction from the mayor, city council members, city manager/administrator, city secretary, city staff and others. It is important to remember who you ultimately represent. You don't represent any individual, including the Mayor, the City Council members, or the city managers, etc. As a City Attorney you represent the City as a whole, the entity is your client. See *Texas Disciplinary Rules of Professional Conduct*, Rule 1.12.

**Rule 1.12 Organization as a Client**

**(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.**

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

- (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
- (2) the violation is likely to result in substantial injury to the organization; an
- (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;
  - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
  - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (d) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c) and any further obligations of the lawyer are determined by Rule 1.05.
- (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

#### **Comment:**

#### **The Entity as the Client**

1. **A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.** Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officer, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization such as an unincorporated association, union, or other, entity.

#### **Clarifying the Lawyer's Role**

4. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

5. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organizations consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

#### **Decisions by Constituents**

6. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest responsible authority. See paragraph (c) (3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations are determined by Rule 1.05.



## Government Agency

**7. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved.** In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. **Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole.** For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See Preamble: Scope.

## VII. TDRPC Rule 1.06 Conflict of Interest

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), **a lawyer shall not represent a person if the representation of that person:**

**(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or**

**(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.**

(c) A lawyer may represent a client in the circumstances described in (b) if:

**(1) the lawyer reasonably believes the representation of each client will not be materially affected; and**

**(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature,**

**implications, and possible adverse consequences of the common representation and the advantages involved, if any.**

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

**(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representations properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.**

**(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.**

#### **Non-litigation Conflict Situations**

1. **Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.**
2. **For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.**

#### **VIII. Case Study**

##### **a. Little vs. Leon Valley EDC 2011-CI-17823**

- i. LVEDC wanted a development agreement to purchase real property from Mr. Little for a project in the "Town Center".
- ii. LVEDC and City Council adopted Resolutions to approve a project plan and authorize negotiations of a Development Agreement.

- iii. After lengthy negotiations between Little and LVEDC, agreement was reached. Communications and documents clearly established agreement was contingent on Council approval.
- iv. City Council refused to approve the loan as part the agreement.
- v. During the initial period, same firm represented both City and LVEDC.
- vi. Controversy arose, city hired separate firm for LVEDC.
- vii. EDC had agreement; City Council won't approve loan to complete agreement.
- viii. Developer sues LVEDC (not city) for breach of contract. (In an earlier interlocutory appeal, Fourth Court held that that the trial court had subject matter jurisdiction over the case. 422 S.W.3d 37
- ix. Case tried to jury and jury found that LVEDC intended to be bound by agreements and LVEDC failed to comply with the agreement. **Little was awarded \$1.5 million.**
- x. LVEDC appealed and Fourth Court of Appeals ruled in March 2017 that LVEDC by entering into a contract for economic development, was performing the governmental functions of a Type B corporation and therefore immune from any liability of those functions. (No. 04-15-0048-CV)
- xi. Case appealed to Texas Supreme Court. Petition denied (March 2019)

#### **b. Additional Scenarios**

- i. What if City Council wants to terminate EDC Director
- ii. EDC Director is a city employee
- iii. EDC Board & CM want to retain EDC Director
- iv. Initial EDC Director contract must be approved by EDC Board and Council

### **IX. Conclusion**

Although a City Attorney wears many hats, there will come a time where the City Attorney has to determine who to represent. It will be important to determine who you represent to determine from whom you will take direction, with whom you can discuss confidential matters, and whose interests you represent. When there is a dispute involving both a City and the City's EDC, the City Attorney should represent the City and a separate attorney should be hired to represent EDC.

