

THE TEXAS MUNICIPAL LAWYER™

A newsletter published by the Bojorquez Law Firm, PLLC ★ May 2010

RIGHT TO RECREATION?

In a rather unique zoning case, a Houston appellate court affirmed a lower court's ruling that a variance should have been granted to allow a swimming pool in the side yard of a home based upon the right to enjoy outdoor recreation.

In *Board of Adjustment of the City of Piney Point Village v. Solar* (2005), a property owner sought a zoning variance from the Board of Adjustment (BOA) of the City of Piney Point Village to build a swimming pool in the side yard of his home because his property had a 60' drop immediately behind it. This large drop coupled with pre-existing trees, decks, and brick walls made construction of a swimming pool in the back yard expensive. The city's zoning ordinance required 2 side yards on each lot, and mandated that pools be at least 10 feet from the nearest lot line.

At a BOA hearing, the owner stated the impracticality of building the pool in his back yard, and that denial of his variance request would make his family suffer the hardship of not being able to swim on their property. There was no testimony in opposition. The BOA denied the variance request without giving any reasons for their decision.

The owner then appealed to the district court. After the court accepted the case, the BOA was statutorily required to submit a record of its de-

cision, which must concisely state any pertinent and material facts that show the grounds for their decision (Loc. Gov't Code § 211.011(c),(d)).



The court then reviewed the record along with any additional evidence necessary to determine whether the BOA acted illegally in reaching their decision, thus abusing their discretion. A legal presumption exists in favor of a BOA's decision to grant or deny a variance. The aggrieved party has the burden of proof to clearly establish abuse of discretion, which shows that failure to grant the variance would result in unnecessary hardship, and that granting the variance would not adversely affect other interests.

In this case, the BOA failed to provide the court with the statutorily required record of any pertinent and material facts to support its decision, and instead argued in court that financial hardship is not an unnecessary hardship. While it is true that a financial hardship does not constitute an unnecessary hardship sufficient to support a variance request, the court found that without the variance, the owner would be deprived of the ability to swim on his property, which was a loss of the "right to recreation," and that such a loss constitutes an unnecessary hardship. Therefore, the BOA abused its discretion and the variance was granted by the court.

OPEN MEETINGS & OPEN RECORDS TRAINING REQUIRED

Under sections 551.005 and 552.012 of the Government Code, public officials are required to receive training in the requirements of the Open Meetings and Public Information Acts. These laws require elected and appointed officials to attend, at a minimum, a one-hour educational course approved by the Texas Attorney General on each of the two statutes. This is a one-time-only training requirement; no refresher courses are required. Officials have 90 days from the date of swearing-in to complete the training.



Continued on the back...

EDUCATIONAL OPPORTUNITIES

- May 14th: Alan will be presenting on *Landscaping, Conservation of Open Space & New Trends* at the TML sponsored seminar entitled **Planning & Development Regulations: What City Officials Need to Know**, which will be held at the Double Tree Austin North. For more info, visit: www.tml.org/ed_annex.asp.
- June 17th: Alan will be conducting Open Government Training at a seminar sponsored by the Heart of Texas Council of Governments in Waco. The 2-hour session satisfies the statutory mandate on Open Meetings and Open Records education for newly elected officials.

(Continued from Open Meetings and Open Records Training Required)

While the top elected and appointed officials from all governmental bodies are required to attend training, especially regarding the Open Meetings Act, public officials may designate a public information coordinator to attend Public Information Act training in their place so long as the designee is the person primarily responsible for the processing of open records requests for the governmental body.

The Bojorquez Law Firm, PLLC, is proud to offer Attorney General approved Open Meetings and Public Information Act training to newly-elected and appointed officials. The 2-hour training course covers both acts in detail and those who successfully complete the training will receive a certificate of completion. If your city has a new mayor or councilmember who has not yet received the training, please contact us.

CLIENT NEWS



Bruceville-Eddy, Texas—Mayfest will be held the weekend of May 7th & 8th. This is the 27th annual CTBA BBQ Cook-off. Link up to the Mayfest Sign Up sheets and info on www.bruceville-eddytx.com.

Dripping Springs, Texas—Visit the sprawling Harrison Ranch Park for the Playday Buckle Series 2010 on May 15, June 19, July 10, August 14 and September 11 for your chance to win Custom Buckles, Hay Bags, or

Duffle Bags. For questions, please contact Ashley at City Hall 512-858-4725 or Donna at 512-786-8342 or donna@texasdata.net.



INTEGRITY AT CITY HALL

Q: Can I appoint a family member to work for the City?

A: In general the answer is NO, but it ultimately depends on their relation to you. Under the Texas nepotism statute (Government Code Ch. 573), a public official cannot appoint an individual if:

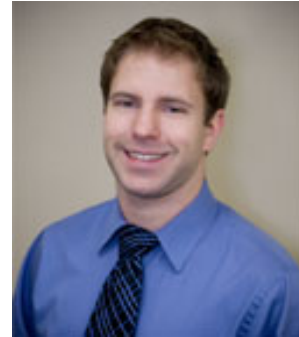
- 1) The official is a member of a governing body;
- 2) The appointee is related to a member of the governing body within the third degree by consanguinity (i.e., blood or adoption) or within the second degree by affinity (i.e., marriage); and
- 3) The position will be directly or indirectly compensated from public funds or fees of office.

For example, an official's parents and children are related within the first degree of consanguinity, siblings are related within the second degree, aunts/uncles and nieces/nephews are within the third degree, and cousins are within the fourth degree which means that the nepotism law does not apply to them.

An official's spouse and the spouse's parents would be within the first degree of affinity, the spouse's siblings would be within the second

degree of affinity, and the spouse's aunts/uncles and nieces/nephews would be within the third degree of affinity which means that the nepotism law does not apply to them.

ABOUT THE FIRM



Damien Shores, the firm's law clerk will be graduating with his J.D. from St. Mary's University School of Law on May 15th 2010. Damien has been with the Bojorquez Law Firm since November 2008. *Congratulations Damien and good luck on the Bar Exam this summer!*



This newsletter is provided free of charge. It is for educational purposes only. It does not constitute legal advice. The viewing of this document does not create an attorney-client relationship.

