

WILLIAM BURKHARDT'S BAR GRIEVANCE COMPLAINT AGAINST MR. BRENT LLOYD

Introduction: I am an architect. I am the chair of the Austin Board of Adjustment (“BOA”) and served on the BOA at the time of the alleged violations below. I file this bar grievance complaint based on personal knowledge against Mr. Brent Lloyd (“Attorney Lloyd” or “Lloyd”). I respectfully request a thorough and complete investigation of Mr. Lloyd’s alleged conduct and any appropriate sanctions. Attorney Lloyd served at all relevant times for this complaint as an Assistant City Attorney for the BOA and City of Austin.¹

This bar grievance complaint alleges that Attorney Lloyd knowingly made false statements to his client the BOA, had conflict of interests in representing his client the BOA, and sought to undermine his client the BOA’s legal objectives. Specifically, this complaint alleges, to the best of my belief, that Lloyd appears to have violated as an attorney in Travis County the following Texas Disciplinary Rules of Professional Conduct (“Rules”) by:

- 1) making misrepresentations to and failing to be candid and honest with his client the BOA (Rules 1.03, 2.01 and 8.04);
- 2) having conflict of interests with his client the BOA (Rule 1.06);
- 3) failing to obtain his client the BOA’s consent to continue his representation despite the conflict of interests (Rule 1.06);
- 4) failing to diligently represent the interests of his client the BOA (Rule 1.01);
- 5) failing to abide by his client the BOA’s objectives in his representation (Rule 1.02); and
- 6) such other Disciplinary Rules and laws as the evidence may reveal.

Executive Summary: The prologue for this complaint is set out in the Texas Court of Appeals case of *Hill Country Estates Homeowners Association v Greg Gurnsey and the City of Austin*, 2016 WL 2160510 (Texas Court of Appeals- Corpus Christi 2015)(Exhibit 1, Opinion, attached). (All exhibits are attached; links also are provided to official City videotapes of hearings). In 2012, two homeowners associations filed a lawsuit against the City of Austin. They contended that the City and its Planning Director, advised by the City Attorney’s Office and Attorney Lloyd, acted *ultra vires* and violated their rights to notice of appeal and due process regarding a BOA administrative appeal. The case was ultimately settled in 2017.

¹ As of February of this year, Lloyd has been transferred from the City’s Legal Department to Development Officer in the City of Austin’s Development Services Department (formerly the Planning Department).

However, because of the serious notice, due process, and *ex parte* communication issues raised in the *Hill Country Estate* case, BOA board members in 2017 began broaching their concerns about the City Attorney's Office and Lloyd's representation of the BOA. The BOA was troubled by the apparent conflicts of interest with Attorney Lloyd's simultaneous legal representation of the City Planning Department (a party-appellee in BOA administrative appeals) and of the BOA (serving as the impartial tribunal adjudicating property owners' administrative appeals of the same decisions of the City Planning Department). Tex. Local Gov. Code, Sections 211.008-211.011. Lloyd first advised legally his client the City Planning Department on its administrative land use interpretations, and then he represented legally the Planning Department during appeals of that decision to the BOA. At the same time, he also provided procedural and substantive legal advice on those same appealed decisions cases to his client the BOA, as the impartial tribunal. Because Attorney Lloyd made to the BOA these recommendations *ex parte* in closed executive session, BOA members were disturbed about perceptions of unfairness to appellants and possible due process violations.

Attorney Lloyd, however, continually reassured the BOA in 2017 through 2019 that he could simultaneously and uncompromisingly represent both its interests and the City's and that there were no conflict of interests or due process issues. (Exhibit 3, City of Austin Budget and Finance Committee Official Hearing transcript of August 2018 ("Audit Committee Transcript"), attached)(City official transcript available at <http://www.austintexas.gov/edims/document.cfm?id=303914>; official City video and audio tape available at <http://www.austintexas.gov/department/city-council/2018/20180814-afc.htm>). Still bothered, the BOA passed overwhelmingly (8-1-1) in June 2018 a resolution asking the Austin City Council for separate outside counsel on administrative appeals. (Exhibit 2, Board of Adjustment 2018 Approved Resolution for Separate Counsel; Exhibit 2A, BOA Minutes of June 2018 hearing, p. 7 (Separate Counsel Motion Approved)).

When in August 2018 BOA Chair Burkhardt and Board member King presented the BOA's resolution for separate counsel to the Austin City Council's Audit and Finance Committee, Lloyd legally advised the Council Committee and he publicly opposed the BOA's request-- helping defeat the resolution. (Exhibit 3, Audit Committee Transcript). In 2017, the BOA also began to look into amending its procedural rules to prevent further possible *ultra vires* and due process violations such as allegedly committed in the *Hill Country Estates* case by the City (advised by Attorney Lloyd and others). Attorney Lloyd repeatedly opposed his client the BOA's proposed rule amendments. (See BOA January 14, 2019 hearing, Item S-1, at 3:20-9:40) (<http://austintx.swagit.com/play/01142019-749/8/>). When asked by the BOA at its August 2018 public hearing if he was having discussions with third-parties opposing his client the BOA's proposed procedural rules, Attorney Lloyd assured them he was not. (Exhibit 4, BOA August 2018 unofficial hearing excerpt, attached)(Official City full video and audio tape available at <http://austintx.swagit.com/play/08132018-1002/2/>).

This appears to have been false. Two months, earlier Lloyd and City staff meet with the Drenner Group (a private Austin real estate law firm) on an unrelated matter at the City's Development Services Department. Based on a meeting participant's audiotaping of part of the conversation, Lloyd appears to have sought to undermine his client the BOA's proposed rules by asking the Drenner Group's lawyers to file objections to the rules. (Exhibit 5, Taped Drenner-Lloyd Discussion of June 15, 2018 (an unofficial transcription with inserted explanations for clarity; Exhibit 5A, the raw electronic audio tape file, attached) (The complainant attests to the authenticity of Mr. Lloyd's statements because he is familiar with Lloyd's voice; the taping was made by a whistleblower).

The Drenner Group and the Real Estate Council of Austin ("RECA") then filed objections in August to the proposed rules to the BOA. (Exhibit 6, August 2018 Letter of Drenner Group, attached; Exhibit 7, August 2018 Letter of the Real Estate Council of Austin, attached). Thus, Lloyd's August 2018 hearing statement, that he had not communicated with third-parties about opposing the rules, appears to be untrue. In my opinion, Lloyd's representation of the BOA appears to violate numerous Disciplinary Rules, as specified below.

Facts: Mr. Lloyd has served since February 2008 as an Assistant City Attorney advising the City of Austin's Planning Department and the City's Board of Adjustment, among other entities. (See <https://salaries.texastribune.org/austin/brent-david-lloyd/1576256/>). Key facts underlying Mr. Lloyd's alleged conflict of interests, in representing simultaneously the City of Austin Planning Department and the BOA, are set out in the appellate opinion of *Hill Country Estates Homeowners Association v Greg Gurnsey and the City of Austin, supra*. In 2008, the City's Planning Department made a general, internal (non-public) land use interpretation regarding what is an allowable religious use for a church applicant (seeking to build a 3500-person outdoor amphitheater adjacent to residential neighborhoods). (Exhibit 1, Opinion, p. 2). There were neither specific site plans, nor public dissemination of the interpretation. Three years later, in July 2011, the church filed specific site plans and the City staff publicly approved the plans on October 2, 2011. (Exhibit 1, Opinion, p. 3). The adjoining homeowners associations then appealed to the BOA within 20 days of the City's approval, as required by the BOA's rules at that time. (Exhibit 1, Opinion, p. 3).

The Board of Adjustments is a state-authorized, quasi-judicial, local land use body. Tex. Local Gov. Code, Sections 211.008- 211.010. *Board of Adjustment v. Flores*, 860 S.W.2d 622 (Tex. App. 1993) ("the Board of Adjustment is a quasi-judicial body" subject to "abuse of discretion" appellate review by the District Court). As the *Hill Country Estates* opinion explains, Texas law provides that the BOA hears and adjudicates as a quasi-tribunal, among other things, administrative appeals of city staff land use interpretation decisions. (Exhibit 1, Opinion, p. 6). The BOA is authorized to "hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter [land use and zoning]." Tex. Local Gov. Code Section 211.009(1). The BOA serves as a quasi-judicial review of, and check on,

City staff's land use interpretations that negatively impact property owners' or adjoining landowners' property rights.

Either the City or an aggrieved party (including the property owners and adjoining landowners) may appeal a city staff administrative interpretation decision to the BOA. Texas Local Gov Code, Sec. 211.010 (a). The appellant files the notice of appeal with both "the board and the official from whom the appeal is taken." Tex. Local Gov Code, Section 211.010(b). The city official "shall immediately transmit to the board all the papers constituting the record of the action that is appealed." Id. Similarly, the Austin City Code makes clear the City of Austin staff must notify the BOA's chair of an appeal. City of Austin Code, Section 25-1-185. (Available at https://library.municode.com/TX/Austin/codes/code_of_ordinances). (See also Exhibit 1, Opinion, p. 6).

However, when Hill Country Homeowners Association filed its notice of appeal with City officials, the City Legal Department (represented by Attorney Lloyd) apparently advised City Planning Director Gurnsey to not forward the notice of appeal to the BOA. Lloyd alleged the appeal was late and, therefore, the BOA had no jurisdiction. The City of Austin, advised by Lloyd, appears to have appropriated to itself, a party to the appeal, the tribunal's function of deciding its jurisdiction. This was without the BOA's consent or knowledge. (Exhibit 1, Opinion, pp. 5-6).

The homeowners associations then filed suit against the City and its Planning Director for allegedly: 1) failing to fulfill its ministerial duty to forward its notice of appeal to the BOA; and 2) violating its due process rights to adequate notice and a right to be heard regarding their property rights. (Exhibit 1, Opinion, pp. 4-7). The District Court dismissed the homeowners associations' lawsuit on jurisdictional grounds. The Court of Appeals reversed and remanded, holding the trial court had jurisdiction to hear whether the City's Planning Director had acted *ultra vires* in failing to send the appeal to the BOA:

[W]e conclude that Hill Country sufficiently pleaded jurisdictional facts to invoke the trial court's subject matter jurisdiction on the alleged *ultra vires* action that Guernsey failed to forward Hill Country's appeal to the Board of Adjustment. Hill Country has appropriately cited the controlling provisions related to administrative appeals procedures and the ministerial duties that respectively belong to Guernsey and the Board of Adjustment.

(Opinion, p. 8). The Court of Appeals remanded, providing as well that the homeowners association's due process claim was not ripe because the BOA had not had an opportunity to decide if the City's non-public, internal interpretation was sufficient notice to trigger appellants' appeal deadlines. (Opinion, p. 7). The parties ultimately settled the matter in 2017.

Based on the *Hill Country Estates* opinion, Chair Burkhardt and other BOA Board members became concerned that Attorney Lloyd's advice and actions appeared to violate due process, to be unfair to BOA appellants, and to undermine the BOA's authority as an impartial tribunal. It appeared to them that Lloyd's actions had worked against the BOA's interests in appropriating to the City without the BOA's consent the BOA's authority as a tribunal to interpret its jurisdiction. There seemed to them to be a conflict of interest in his dual representation: for Lloyd's failure to send the notice of appeal to the BOA ensured that his client the City Planning Department's land use interpretation prevailed, while nullifying appellant's rights of appeal and undermining the BOA's authority as a tribunal to adjudicate its jurisdiction and the appeal. BOA members also were troubled by *ex parte* communication allegations against Attorney Lloyd by Hill Country Homeowners Association's attorney, Robert Kleeman of Austin. He had contended in public hearings and memos that the BOA as an impartial tribunal could not legally continue to be advised by Attorney Lloyd *ex parte* in private executive legal sessions, while simultaneously representing the City as a party in the same appeal to the BOA. (Exhibit 8, Kleeman Letter to Council of October 2017, pp. 11-12, attached).

As a result, the BOA began holding public hearings in 2017 about potentially having the City of Austin hire outside counsel for the BOA to replace Attorney Lloyd and the City Legal Department. (Exhibit 2B, BOA Minutes of April 2017; official City videotape and audiotape available at <http://austintx.swagit.com/play/04102017-1084/2/> (Agenda Item N7)). The BOA also began looking into requiring rule changes that would require the city staff to forward all notices of appeals to it and would allow the BOA to toll its twenty-day deadline if the City failed to properly notify property owners and adjacent landowners. Attorney Lloyd repeatedly assured the BOA at public hearings and in private that he could fairly and fully represent the BOA and that there was no legal authority to allow tolling of the BOA's twenty-day deadline because of inadequate notice or improper city staff conduct. (See BOA January 14, 2019 hearing, Item S-1, at 3:20-9:40) (<http://austintx.swagit.com/play/01142019-749/8/>).

In August 2018, the BOA formally requested before the Austin City Council Audit and Finance Committee that the City hire and pay for outside counsel for the BOA. (Exhibit 3, Audit Committee Transcript, pp. 17-35). BOA Chair William Burkhardt and Board member Bryan King testified on behalf of a BOA resolution (passed overwhelmingly by the BOA in June 2018²) to hire outside counsel on its administrative interpretation appeals. This resolution stated that the BOA sought separate counsel because of Attorney Lloyd's perceived "inherent conflict of interest" and "ex parte communications with the BOA creating an appearance that the Board

² The BOA first passed unanimously more than a year before in April 2017 a motion asking the Council to consider funding separate counsel on interpretation appeals because of conflicts of interest. (Exhibit 2B, Board of Adjustment Minutes April 2017, p.11).

of Adjustments Appeal process is not transparent, fair or accountable”. (Exhibit 2, BOA Approve Resolution for Separate Counsel, p. 2)³.

Board member Bryan King testified that the BOA wanted an outside attorney instead of Attorney Lloyd because:

I've been on the board for a dozen years and we always go into executive session on interpretation cases and we usually go into executive sessions with the attorney [Lloyd] that has been representing the city, on the city's side of the dispute. So the attorney that's been advising [city] folks over 505 [an administrative interpretation] is now in executive session with us [the BOA] and the public perception is that that's skewed. I have felt that way for a long time and thought we should be looking to an outside attorney for those particular cases.

Exhibit 3, Audit Committee Transcript, p. 18).

Chair William Burkhardt testified that the *Hill Country Estates* case suggested the reality of potential conflict of interests and due process legal problems for the BOA: “And the idea that the city attorney is communicating with one party in an appeal of development services and then meeting with the board, which is an independent quasi-judicial board who, again-- whose decisions are appealed to district court, the idea that a decision could be challenged on that basis is a reality. We had one significant case [*Hill Country Estates*] recently that could have -- if it had not been resolved amicably or relatively amicably between the parties might have gone significantly further than perhaps the state court of appeals.”⁴ (Exhibit 3, Audit Committee Transcript, p. 17).

³ The BOA Approved Resolution stated: “The BOA should retain independent legal counsel as it *is an inherent conflict of interest for the Legal Department to represent City Staff with respect to an administrative decision, the subject of a Board of Adjustment Appeal*, and then advise or go into executive session with the Board of Adjustment relating to that appeal and, 3. City legal department should not attend BOA Executive sessions. City legal is rightfully counsel to the defendant of the interpretation (COA) and *their attendance would constitute ex parte communications with the BOA, creating an appearance that the Board of Adjustments Appeal process is not transparent, fair or accountable* when the Board of Adjustment makes decisions based on City Legal advice that is kept from the public”. (emphasis added) (Exhibit 2, Board of Adjustment 2018 Approved Resolution for Separate Counsel, p. 2)

⁴ Chair Burkhardt further explained: “So we had one case called the Life Austin [the Church in the *Hill Country Estates*] case... and that's specifically the kind of case where the perception or the reality of a potential conflict of interest with respect to the independence of the board would potentially become a legal argument as that case moved forward to appeals if it had gone that far.” (Exhibit 3, Audit Committee Transcript, p.20).

Board member Bryan King summed up before the Audit Committee Attorney Lloyd's apparent conflict of interest in simultaneously representing the City as a party and the BOA as the tribunal :

The public's perception [of a conflict of interest], I've heard that from many community members. But as a board member in executive session, it is my perception that there's a conflict of interest... And I don't think if we had someone that was not ingrained in the process all the way through [like Attorney Lloyd] that they would be giving us the same -- I'm going to use the word opinion rather than legal advice on where we were going in that particular session. *So my perception is there's a conflict of interest. The public's perception is there's a conflict of interest.*

(Exhibit 3, Audit Committee Transcript, p. 23)(emphasis added).

At the Audit Committee hearing, Mr. Lloyd publicly opposed his client the BOA's request to obtain another attorney. (Exhibit 2, Audit Committee Transcript, 20-26, 34-35). He apparently failed to consider that the BOA, as a tribunal, wasn't just another city department reporting to the City Manager or that his legal opinion might not be right:

But state law also gives the board of adjustment as a quasi-judicial body authority to consider appeals of permit approvals and other sorts of decisions that affect really the interpretation and application and enforcement of city code, and it's a broad right that the board has. The board is unique in that regard. Board decisions are appealable not to council but to district court. *Under the rules of professional conduct, the city attorney's office represents all units of city government, and it's not uncommon that units of city government have differences in perspective. It's not uncommon that staff approval will be appealed to the board and of course staff believes they made the right decision. They wouldn't -- otherwise they would have made a different decision....*

(emphasis added)(Exhibit 3, Audit Committee Transcript, pp. 20-21) .

Attorney Lloyd further testified against his client that there was no legal authority that would suggest in any way a conflict of interest in his representation of the BOA: "So we're aware of no legal authority, no case law that in any way calls into question our conduct with respect to representing the board." (emphasis added).(Exhibit 3, Audit Committee Transcript, pp. 20-21).

However, as the BOA recognized, the *Hill Country Estates* opinion, *supra*, itself had tacitly raised conflict of interest issues. The Court of Appeals held that the City staff's actions, based on Attorney Lloyd's advice, had violated the City's ministerial duty to the BOA to forward administrative appeals to the BOA. (Exhibit 1, Opinion, pp. 4, 6-7). The situation appeared to reveal an inherent conflict between Lloyd's two clients and that he appeared to favor his client

the Planning Department staff over his client the BOA. For Attorney Lloyd's Planning Department client wanted notices of appeal not to be forward to the BOA, and, thereby, to preclude any possible challenge of its decisions and Lloyd's legal advice; while Attorney Lloyd's client, the BOA, as the tribunal, wanted to interpret its own jurisdiction and had a duty to provide a fair hearing to all parties, not just the Planning Department.

Attorney Lloyd's definitive statements to the City Council Audit Committee, that there was no legal authority suggesting conflict of interest issues of any kind, are incorrect. It is well-established, and long-known, that "government lawyers, like private lawyers, face conflicts of interests." William Josephson and Russell G. Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*, 29 Howard L. J. 539, 539 (1986).⁵ "Almost daily, City and County Attorneys face a number of interesting ethical questions... The identity of the [government] lawyer's client is a critical threshold issue, since, as a core professional principle, the lawyer's professional duties to safeguard his or her client's confidences and to avoid conflicts of interest are owed only to 'clients'." C. Thompson, *Some Ethical Conundrums for City and County Attorneys* (Illinois Municipal Lawyers Ass'n 2009), p. 1.

For government lawyers, conflict of interests in representing different components within a governmental entity are common: "[L]ocal government lawyers tackle the question of client identity almost daily: Government lawyers constantly grapple with the issue of who is their client. For example, is the client of a county attorney the county, the county legislative body, individual county commissioners, department heads, or the taxpayers of the county?" *Id.*, p. 2. "Conflicts of interest is an area full of land mines for municipal attorneys". Prof. Salkin, *Ethical Considerations for Town Attorneys: Avoiding Conflicts of Interest and Other Potential "Land Mines"*, 19 NYSBA/MLRC Municipal Lawyer 9, 9 (Spring 2005).

Ethics lawyers advise "treating separate agencies like separate clients, and ... suggest that representation of conflicting agencies by government lawyers from the same law department is to be avoided." New York City Bar, Op. 2004-03, *Government Lawyer Conflicts: Representing a Government Agency and Its Constituents*. See also, Salkin. *Ethical Considerations*, p. 13. ("when in conflict, each [government] entity is entitled to its own legal representation"). Separate

⁵ See also *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1413-46 (1981); Judge Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Me. L. Rev. 155 (1966); Weinstein & Crothwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. Rev. 1 (1985); C. Thompson, *Some Ethical Conundrums for City and County Attorneys* (Illinois Municipal Lawyers Ass'n 2009)(available at <http://www.iml.org/file.cfm?key=2597>); New York City Bar, Op. 2004-03, *Government Lawyer Conflicts: Representing a Government Agency and Its Constituents* (available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2004-03-government-lawyer-conflicts-representing-a-government-agency-and-its-constituents>).

counsel for local governmental bodies is especially appropriate when such a body has independent decision-making power from the governing body (such as a tribunal like the BOA). C. Thompson, *Some Ethical Conundrums for City and County Attorneys* (Illinois Municipal Lawyers Ass'n 2009), pp. 5, 8; Josephson et. al, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*, 29 Howard L. J. at 564-565.

It is also well understood in administrative law that serious conflict of interest and *ex parte* communication problems exist in the context existing in this complaint: when a government attorney simultaneously represents both City staff (in making and defending its policymaking decisions) and an administrative tribunal (in adjudicating the same decision). See, e.g., G. Dahl, *Advising Quasi-Judges: Bias, Conflicts Of Interest, Prejudgment, And Ex Parte Contacts*, 33 Colo. Law 69 (2004). C. Peck, *Regulation And Control Of Ex Parte Communications With Administrative Agencies*, 76 Harvard L. Rev 233 (1962)(prevention of *ex parte* communications with administrative agencies is necessary when the agency staff or lawyer represents an interested party because of possible biased presentations); B. Moline, *Ethical Dilemmas For The Kansas Government Lawyer*, 5 Kan. J. L. & Pub. Policy 105 (Fall 1995)(government lawyers often have potential conflicts of interest with different components of government; if one of these governmental components has adverse interests, then a government lawyer cannot represent both components). Several commentators have even discussed dual representation conflict of interest problems in the quasi-judicial local land use commission context, such as with BOAs. Dahl, *Advising Quasi-Judges: Bias, Conflicts Of Interest, Prejudgment, And Ex Parte Contacts*, 33 Colo. Law 69 (2004)(discusses the legal and ethical problems of lawyers and local quasi-judicial bodies, including those involved in zoning and land use); R. Baker, *Ethical Limits On Attorney Contact With Represented And Unrepresented Officials: The Example Of Municipal Zoning Boards Making Site-Specific Land Use Decisions*, 31 Suffolk U. L. Rev. 349 (1997) (ethical and legal issues with *ex parte* communications by attorneys before a quasi- judicial municipal zoning body at a contested, public hearing).

Attorney Lloyd also told the Audit Committee that it would be quite difficult to replace his expertise: "So I think finding somebody [another attorney] that can check all those boxes, that has the time available and the flexibility in their schedule to provide the sort of quick triage like legal service that is required in these cases and has the sufficient experience *would be a tall order.*" (emphasis added). Actually, the Austin area appears to have dozens of real estate lawyers that understand the BOA process and the City's Land Development Code-- yet would not simultaneously be representing the City as appellee defending their own legal interpretation and advising the BOA as the tribunal. Mr. Lloyd convinced the City Council Audit and Finance Committee to table his client the BOA's resolution. This further perpetuated mistrust with his client.

Throughout 2018 and early 2019, the BOA also deliberated and considered changes to its procedural rules. These proposed changes, among other things, would require the city to send all

notices of appeals to the BOA and to allow the BOA to toll the 20-day deadline to appeal if the city failed to provide adequate notice or it engaged in misconduct. (Compare Exhibit 9, BOA 2017 Rules, Section 2(B)(2)(20-day deadline), p. 2, attached, and Exhibit 10, BOA New 2019 Rules, Section (2)(B)(2)(a)(20-day deadline can be tolled for various reasons), p.3, attached). Attorney Lloyd repeatedly opposed in public his client the BOA's proposed tolling amendment and other changes. (See BOA January 14, 2019, hearing, Item S-1, at 3:20-9:40) (<http://austintx.swagit.com/play/01142019-749/8/>).

Attorney Lloyd appears to have a conflict of interest between his two clients, the City Development Services Department and the BOA, over the proposed rules. His client the BOA sought to amend its rules to protect its jurisdiction and to ensure due process and fairness to all parties. His client the City's Development Services Department, however, opposed the BOA's tolling amendment that would allow appellants to appeal City decisions because of City staff missteps. The Department appears to favor summarily dismissing appeals for alleged lateness, and thus upholding without a contest its interpretation decisions.

Although his clients' interests conflicted on the proposed rules, Lloyd advised his client the BOA that it had no legal authority to pass a rule to toll the 20-day deadline for inadequate Development Services Department notice or misconduct. (See BOA January 14, 2019, hearing, Item S-1, at 3:20-9:40) (<http://austintx.swagit.com/play/01142019-749/8/>). This legal advice appears skewed since tolling agency deadlines for inadequate notice or improper conduct is common in administrative law. See, e.g., *In Re United Services Automobile Association*, 307 S.W.3d 299, 311 (Tex. 2010)(courts may toll agency deadlines based on waiver, estoppel, and equitable grounds); *Bailey v. Gardner*, 154 S.W.3d 917, 920 (Tex. App.-Dallas 2005, no pet.) (equitable tolling allowed "where a claimant was induced or tricked by his adversary's misconduct into allowing filing deadlines to pass.").

Mr. Lloyd assured his client the BOA publicly at its August 2018 hearing that he was not discussing beforehand its proposed rules with third-parties. (Exhibit 3, BOA August 2018 hearing excerpt, attached). This appears to be false.

At an unrelated meeting between City Planning staff and the Drenner Group Law Firm two months before on June 15, 2018, Attorney Lloyd on his own initiative asked several of this firm's private real estate developer attorneys to oppose the BOA's proposed procedural rules--contrary to his client BOA's objective and interests. Fortunately, a part of the conversation was taped and has been transcribed. (Exhibit 5, Drenner-Lloyd Discussion of June 15, 2018; Exhibit 5A). This audio segment seems to show that Attorney Lloyd was working directly contrary to his client BOA's interests:

Brent Lloyd: Well they [BOA members] say they point to the state law that says it [BOA's proposed rules] shall be determined under our [City] rules..

Greta Goldsby [Drenner Group lawyer]: Ok.

Brent Lloyd: *So, you know, so, so, if you have legal arguments...*

Greta Goldsby: I do

Brent Lloyd: *Yeah, I do too. But nobody, nobody, is there to help us [against BOA proposed rules]. We are, we are swimming and you are going to suffer [from BOA's proposed rules].*

(Exhibit 5, Tape of Drenner-Lloyd Discussion of June 15, 2018, p.1). Attorney Lloyd then asked the Drenner Group to generate letters and communications opposing his client the BOA's proposed rules:

Brent Lloyd: *OK So, So, [unclear] could you also write some [unclear] sentence about a particular case [against the proposed BOA rules]*

Greta Goldsby: Yes

Brent Lloyd: You can write to council members because, what nobody, this is, seems like a very arcane issue and nobody is really thinking about it [BOA proposed rules], it doesn't appear in the Austin Monitor [electronic newsletter] or anything. *But, I am here to tell you if this [proposed BOA rules] happens you may find all of the sudden a whole slew of stop work orders, cause people are going to be like..*

Greta Goldsby: If they don't like it that's what they'll do

Brent Lloyd: Yeah...

Andy Linseisen [City of Austin Development Services, formerly Planning Department]: *Knowing the chairman [William Burkhardt and BOA proposed rule proponent] will take it [the proposed rules] up...*

(emphasis added) (Exhibit 5, Tape of Drenner-Lloyd Discussion of June 15, 2018, pp.2-3).

In August 2018, apparently at Attorney Lloyd's prompting, the Drenner Group and also RECA filed objections to the proposed rules of his client the BOA. (Exhibits 6 and 7, Letters of Drenner Group and RECA in August 2018). The Drenner Group and RECA, representing developers as lawyers or advocates, often support city staff land use interpretations regarding developments; thus, they often do not want appeals by adjacent landowners to be heard or overturned by the BOA. Lloyd's actions would appear to undermine and conflict with his client the BOA's objective in amending its procedural rules to comport with due process and fairness.

Attorney Lloyd apparently not only failed to disclose his adverse actions against his client the BOA, but made false and misleading statements to his client the BOA about his prior contacts

with the Drenner Group. At the BOA's August 2018 hearing, BOA Chair Burkhardt and BOA member King were concerned that The Drenner Group's and RECA's letters to the BOA seemed nearly identical to Lloyd's confidential legal memo to the BOA. They directly asked Attorney Lloyd if he had discussed the matter with outside third-parties. He denied he had initiated discussions with the Drenner Group on opposing the BOA proposed rules.

Burkhardt: Brent, briefly, and before we move on the substitute motion, have you shared this document [Lloyd's confidential legal memo to the BOA] with RECA or the Drenner Group?

Lloyd: Of course not. So.

Burkhardt: *The cites are virtually identical [to the RECA and Drenner Group letters].*

Lloyd: *The memo is written independently.* The state law, whoever is citing the law, is going to use the same citations. So I would not be surprised if anyone discussing these issues, is going to be citing the same code sections. When we...

Cut to 8:31

King: I think what you were asking, William, were you asking if he had discussions with them.

Burkhardt: Yes

King: *Is that what you are asking? Have you had discussions with Drenner?*

Lloyd: *No. So I should say that, um, when we provide legal advice to the board, we're gonna provide it under attorney client privilege. But in telling the board that you have the authority to waive that and release the document, I'm also telling you that I don't see a downside to that.* If this were a memo where I felt that it would compromise the city's interests, I would tell you. So if the board sees fit to release this document, its fine....

Cut to 8:32

King: I think, what I specifically what I wanted to ask him, is have you had discussions with Drenner group, have you had discussions with RECA about this?

Lloyd: I have received calls asking about the item and I indicated it would be considered tonight and they wanted to know how to go about submitting public comment and I told them that those would have to be submitted to Leane. They asked about whether or not um they could contact the board members directly, I

suggested that they not do that, that they provide communications directly to staff.

King: So you have only had incoming phone calls from them.

Lloyd: That's correct.

(emphasis added). Exhibit 3, BOA August 2018 hearing excerpt). Lloyd's statements to his client the BOA appear false and misleading. The June 2018 tape suggests Lloyd initiated in person the discussion with the Drenner Group and asked them to generate and send in objections to his client's proposed rules. (Ex. 4, August 2018 BOA hearing, pp. 1-2)

The Law: The Board of Adjustment is a sovereign board established by the City Council pursuant to Chapter 211 of the Texas Local Government Code. Board of Adjustment Rules of Procedure (July 2017), p. 1.⁶ See also Wood, Zoning Board of Adjustments: Pitfalls to Avoid (Texas City Attorney Association Summer 2011), p. 2. The Board is a quasi-adjudicatory body serving as a tribunal in disputes between certain city staff land use decisions and property owners: "The Board of Adjustment is a quasi-judicial body with authority to decide the rights of individual parties, subject to the requirements of state law and the Land Development Code." (Exhibit 10, Board of Adjustment Rules of Procedure (July 2017), p. 13. See also Tex. Local Gov. Code, Section 211.010. Its quasi-judicial decisions may be appealed to District Court (not the City Council) by either an aggrieved party or the City. Tex. Local Gov. Code, Section 211.011.

The Texas Disciplinary Rules of Professional Conduct define tribunal broadly to include quasi-judicial bodies such as the BOA: "'Tribunal' denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. 'Tribunal' includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter..." As the duly authorized tribunal, the BOA is empowered to determine its own rules and jurisdiction and to make its own decisions-- and not the City staff. Texas Local Gov Code, Sec. 211.010 (a). The appellant must file with the board and the official from whom the appeal is taken a notice of appeal specifying the grounds for the appeal. The appeal must be filed within a reasonable time *as determined by the rules of the board.*" Id., 211.010(b)(emphasis added). As a sovereign,

⁶ The City of Austin acknowledges that the Board is a sovereign adjudicatory body: "The Board of Adjustment is a 'sovereign board,' which means that it makes final decisions on behalf of the City for those matters within its legal authority." A Community Guide to the City of Austin's Board of Adjustment (July 2015), p. 6.

quasi-judicial tribunal, the BOA clearly has due process, fairness, and ex parte communication issues that local policymaking boards do not. See, above, pp. 8-9. It has independent, statutory authority as a quasi-judicial tribunal to review appeals of city staff decisions; as a tribunal, it is not subject to the governing body's (Council's) oversight but the Court's. Its purposes, interests, and functions are different than the governing body or the city as whole. This is a key reason they should have separate counsel. See, above, p. 9.

Like other states' bar disciplinary rules, the Texas Disciplinary Rules apply the same rules to government lawyers as private lawyers. The Disciplinary Rule comments state clearly that "a lawyer licensed or specially admitted in Texas and representing a government agency is subject to the Texas Disciplinary Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.06 and the protections afforded former clients in Rule 1.09." Texas Disciplinary Rules of Professional Conduct, Rule 1.10, Comment 2, p. 43. The conflicts of interest rules apply fully to government lawyers: "Only when both conditions-- that the representation obviously can be adequate and the clients give consent-- are satisfied is a lawyer permitted to represent clients with differing interests. Nothing in the Code indicates that its rules do not apply with full force to lawyers who are public officers. Josephson et. al, *To Whom Does the Government Lawyer Owe the Duty of Loyalty*, 29 Howard L. J. at 541. Failure to apply conflicts of interest rules to government attorneys "would undermine the adequate legal representation of independent public officers [and]...our adversarial system." *Id.*

I allege that Attorney Lloyd violated the following Disciplinary Rules:

A. Lloyd violated Disciplinary Rule 1.06 involving conflicts of interests. Rule 1.06 provides in relevant part that "a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which the person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; (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." Lloyd simultaneously represented the City of Austin as a party before the BOA while also representing the BOA as an impartial tribunal. His conflict of interest appears obvious: the City Department and Lloyd want their administrative land use decisions upheld, while the BOA's duty is to render impartial decisions, which may go against the City and Lloyd. The City and Lloyd also wants landowners' notices of appeal of its decisions to not be forwarded to the BOA but dismissed summarily for lack of a timely appeal. The BOA, however, has a legal responsibility to determine its own jurisdiction and to ensure proper notice to appellants. Lloyd and his client the Planning Department's interests appear materially adverse to the BOA's; yet he continued to represent both in administrative appeals, deciding the BOA's jurisdiction, and the BOA's proposed procedural rules. Rule 1.06's comment indicates Lloyd could not provide independent judgement to both the City staff and BOA in these matters because their interests are directly adverse: "Within the meaning of Rule 1.06(b), the representation of one client is 'directly adverse' to the representation of another client if the lawyer's independent judgment on

behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.”

Rule 1.06 (c) also requires a client’s consent to a conflict of interest: “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.” Attorney Lloyd never received the consent of his client the BOA to continue his representation. Nor did he provide a full and complete disclosure of the alleged conflict to the BOA. In fact, he never sought their consent, but actively opposed their desire to end his conflicted representation, in violation of Rule 1.06 (c).

B. Lloyd violated Disciplinary Rule 1.01 by failing to diligently represent the interests of his client the BOA and Rule 1.02 by failing to abide by his client the BOA’s objective in his representation. Rule 1.01 requires a lawyer to provide competent and diligent representation. Comment 6 explains that this includes “commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.” Rule 1.02 provides, in pertinent part, that “a lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation.” Attorney Lloyd appears to have failed to abide by his client the BOA’s objectives regarding being an impartial tribunal, its jurisdictional authority, and its proposed rules. His objective seemingly was to serve the City’s interests in BOA appeals and not the BOA’s in being an impartial tribunal. Moreover, by seeking to undermine his client the BOA’s objectives, he apparently violated his duty to diligently represent his client’s interests. As Preamble section 3 states: “In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law.” Texas Disciplinary Rules of Professional Conduct. Attorney Lloyd, however, appears on the June 2018 audiotape to be actively undermining his client’s position.

C. Lloyd violated Rules 1.03, 2.01, and 8.04 (a) by failing to be honest and candid with his client the BOA. As a fiduciary to his client the BOA, Attorney Lloyd owes his client the utmost candor and honesty. The Disciplinary Rules are replete with a lawyer’s duty of candor and honesty to his clients. For example, Rule 8.04(a)(3) states a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Yet Attorney Lloyd appears to have made false and misleading statements to his client the BOA, stating that he had not consulted third-parties about the proposed rules and had not generated their letters in opposition to his client’s proposed rules. His legal advice to the BOA as to its proposed rules and authority also appears misleading, incomplete, and biased by his conflict of interests.

Conclusion: Attorney Lloyd appears to have violated multiple disciplinary rules in his

representation of the BOA. He continued to represent his client the BOA despite serious conflicts of interest and despite his client's opposition. He appears to have failed to represent his client BOA diligently or to abide by its objectives. And most damning, he apparently made misrepresentations to his client the BOA so as to mislead them as to his activities undermining their interests in passing new procedural rules.