

LOCAL GOVERNMENT LAW

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David M. Lawrence, Editor

LAWYERS RUNNING FOR CITY COUNCIL: A PRUDENT LOOK BEFORE LEAPING

■ William I. Thornton, Jr.

Lawyers have a long, proud, and honorable tradition of seeking and holding elected public office and, following in that tradition, are sometimes drawn to races for city and town councils. Serving on a city or town council, often called one of the governments closest to the people, gives a lawyer an opportunity to do good and to serve the community of which the lawyer is a part. But, it also may present problems for the unwary lawyer. This article discusses some of the ethical and statutory questions that a lawyer should consider before making the leap into the race for city or town council.

The first are questions about how election to the city or town council limits the lawyer's practice. These are followed by questions about statutes that have ethical consequences.

1. Can I be the city or town's lawyer and on its council, too?

No, unless the town has a population of 7,500 or less. Section 14-234 of the North Carolina General Statutes (hereinafter G.S.) limits the ability of public officials to profit from their public office. G.S. 14-234(a) prohibits, among other things, a council member from making "any contract for his own benefit, under such authority" or being "in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another." A contract for legal services is covered by this statute. The prohibition does not apply, however, to persons elected (or appointed) to elective office in a town or village with a population of 7,500 or less according to the most recent official

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federal census.¹ Restrictions apply to this small town exception, however: 1) The contract for legal services would have to be approved by a specific resolution of the council, in open session and recorded in the minutes, and payment of no more than \$15,000 within a twelve-month period may be authorized; 2) You could not vote or participate in any way in the council's consideration of the resolution; 3) The total amount of your contract(s) would have to be included in the town's audited annual statement; and 4) Your name would be included on a list with other council members who have contracts with the town or village, including a short description of your contract and the amount you have received in the preceding twelve months (the list is updated quarterly).

2. Well, could my firm represent the city or town?

Maybe. RPC 130, issued by the North Carolina State Bar on October 23, 1992,² ruled that it is not unethical for the partner, associate, or law firm of a lawyer serving on a county or municipal governing board to represent that governing board provided that three things occur. First, the relationship between the firm and the lawyer serving on the governing board must be revealed; second, the lawyer board member must have no part in the selection of the partner, associate, or firm; and third, that "the engagement is otherwise lawful." The opinion then refers to the prohibition and exceptions thereto in G.S. 14-234, which is discussed in the first question and answer above.

G.S. 14-234 would appear to bar any local government from contracting for legal services with a lawyer board member, or that lawyer's firm. But there are exceptions to this prohibition. One is the small town exception discussed above. A second exception, relevant to this discussion, allows contracts between a city or town and an entity in which the governing board member's interest is 10 percent or less, or in which the board member is an employee.³ This exception may apply to a law firm.

Therefore, if a lawyer is elected or appointed to a town or city council, that lawyer's firm may not represent the town or city unless 1) the lawyer is an associate and has no ownership interest in the firm, 2) the lawyer's ownership interest in the firm is 10 percent or less, or 3) the small-town exception discussed above applies.

1. N.C. Gen. Stat. § 14-234(d1).

2. *NC State Bar Lawyer's Handbook 2000* (Raleigh, N.C.: North Carolina State Bar, 2000) (hereinafter *Handbook*) page 171. See Rules of Professional Conduct (RPC) 130.

3. G.S. 14-234(c1).

If G.S. 14-234 does not prohibit the contract, the lawyer would have to ensure that his or her relationship with the firm is revealed and that the lawyer does not vote on the resolution authorizing the contract with the firm.⁴

3. Are there other areas of my practice that might be affected if I get elected?

Yes. If the city or town council is responsible for hiring, firing, promoting, or setting the salaries of the city or town's police officers, then, under RPC 63⁵ and 73⁶ it would be improper for a lawyer member of the council to represent criminal defendants in cases in which those police officers are prosecuting witnesses. These opinions protect police officers from being cross examined by an attorney who may be in a position to influence the officer's salary or employment. The partners and associates of the lawyer, however, are not in a position to exercise similar influence on the police officer and are not subject to the disqualification.

The disqualification prescribed under RPC 63 and 73 may not, as a practical matter, be as broad as would first appear. Many of North Carolina's cities and towns operate under council-manager forms of government in which the city or town manager has the authority to hire, fire, promote, and make pay raise decisions concerning subordinate employees, including police officers.⁷ The council may adopt general personnel policies, approve the budget, and establish or amend pay plans for city employees, all of which may affect police officers, but not in the direct manner contemplated by RPC 63 and 73. Whether the imposition of the city manager between the council and the individual police officer is a sufficient buffer to avoid the influence problem to which RPC 63 and 73 are directed is a question yet to be decided by the State Bar.

4. When I leave the council, will there be any restrictions on my practice as a result of my having held public office?

Possibly. Rule 1.11 is captioned "Successive Government and Private Employment."⁸ One of its purposes is to prevent lawyers from exploiting public office for the benefit of a private client.⁹ While the rule clearly governs a lawyer who moves from private

4. *Handbook, supra* note 2, page 171. See RPC 130.

5. *Handbook, supra* note 2, pages 147 and 148. See RPC 63.

6. *Handbook, supra* note 2, page 150. See RPC 73.

7. G.S. 160A-148.

8. *Handbook, supra* note 2, pages 86 and 87. See Rule 1.11.

9. *Handbook, supra* note 2, page 87. See comment [1].

practice to government employment or from government employment to private practice, it may also apply to lawyers elected to public office. The provisions of the rule refer to lawyers “serving as a public officer.” Nothing in the comments to the rule or in the ethics opinions noted under it discuss the applicability of the rule to lawyers serving in elected public office. The American Bar Association (ABA) rule, after which the North Carolina rule is patterned, is also silent on this point.¹⁰

In one jurisdiction, however, a federal district court applied an Illinois rule, similar to North Carolina’s rule, in deciding a motion to disqualify a former city council member from representing a client in a case against the city. Although the court applied the rule, it found that the lawyer council member’s participation in the events, which gave rise to the case, did not meet the “personal and substantial” requirements of the rule and denied the motion.¹¹ Because a similar application of North Carolina’s rule is possible, the rule is discussed here.

Subparagraph (b) of North Carolina’s Rule 1.11, for example, prohibits a lawyer who has gained confidential government information about someone while serving as a public officer, from representing a client with adverse interests in any matter in which the confidential information could be used to the material disadvantage of that person. A council may hold a closed session to consider a complaint filed against a city employee, or to hear a report concerning an investigation of criminal conduct by a city employee.¹² If Rule 1.11 applies, it would be improper for the lawyer to represent the spouse of the city employee in a divorce proceeding in which the confidential information discussed in the closed session could be used to the material disadvantage of the city employee.

The disqualification does not apply to representations expressly permitted by law. Other lawyers in the firm could accept such a case but only if the former council member is properly screened and receives none of the resulting fee.¹³

Other provisions of Rule 1.11 govern representation of a private client concerning “a matter in which the lawyer participated personally and substantially as a public officer” and participation in matters while a

public officer, “in which the lawyer participated personally and substantially while in private practice.”¹⁴ A careful review of Rule 1.11 is warranted by any lawyer intending to run for town or city council.

5. How about my partners and associates? Can they bring matters before the council if I’m a member?

Yes, but the lawyer council member must do at least four things. First, the relationship between the council member and the firm must be disclosed either in writing or during an open meeting of the council. It would be advisable that this be done at the first opportunity and that the disclosure be recorded in the minutes of the council. Second, the council member must not only refrain from consideration of the matter but must also avoid commenting on it. This prohibition bars behind the scenes lobbying by the council member with other members of the council. Third, the council member must absent himself or herself from the meeting while the matter is discussed. Before leaving the meeting, however, the council member should ask to be excused from the meeting by the other members of the council. Otherwise, the council member is counted as being present for quorum purposes and as voting in the affirmative on the matter under G.S.160A-74 and 75. But, whatever the council’s response to the request to be excused from the meeting may be, the ethical requirement is to withdraw from the meeting and from voting. Fourth, the council member must not vote on the matter. If these steps are taken, it is not improper for the council member’s partners or associates to appear before the council.¹⁵ For example, it would not be improper for the lawyer council member’s partner to represent a developer before the council on a request for rezoning of property, if these procedural requirements are met.

One word of caution: In some cases, such as the council’s consideration of granting a special use permit under a city zoning ordinance, a city or town council may act in a quasi-judicial capacity.¹⁶ In such cases, both the lawyer and the lawyer’s partners and associates should be especially sensitive to these requirements. A failure to do so could result in a challenge to an otherwise favorable action by the council.

10. *ABA Annotated Model Rules of Professional Conduct*, 4th ed. (Chicago: American Bar Association), Rule 1.11 (1998).

11. *Park-N-Shop Ltd. v. City of Highwood*, 864 F. Supp. 82 (N.D. Ill. 1994).

12. G.S. 143-318.11(6) and(7).

13. *Handbook*, *supra* note 2, pages 86 and 87. *See* Rule 1.11.

14. *Id.*

15. *Handbook*, *supra* note 2, page 145. *See* RPC 53.

16. *See* G.S. 160A-381 and G.S. 160A-388(c).

6. What if I did, and continue to do, all of the things required of me so that my partner could bring a matter for a client before the council, but the council acts contrary to the client's position? Could my partner then file suit against my city or town?

No. Under RPC 160,¹⁷ this would be considered an "irreconcilable conflict" and improper even if the procedural safeguards discussed in the preceding question were taken. At one time, under decisions of the State Bar, it was possible for a lawyer to file suit against a city or town in these circumstances. But, the State Bar has overruled its prior opinion; and since July of 1994, filing such a suit for a client against the city or town would be improper.

7. Anything else I should consider?

Yes. There are some statutes that apply to council members that may have not only criminal penalties but ethical consequences as well.

Rule 8.4¹⁸ makes it professional misconduct to "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;" or "(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," among other things.

Comment [4] to Rule 8.4¹⁹ states, in part: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney."

There are at least three statutes, in addition to G.S.14-234 discussed in questions 1 and 2, which apply to lawyers holding public office. These appear to govern conduct contemplated by Rule 8.4.

8. What are the three statutes to which you refer?

G.S. 14-234.1 deals with misusing confidential information. G.S. 133-32 governs receiving unlawful gifts and favors. A third, more obscure statute, G.S.160A-511 proscribes conduct when the council is acting as a redevelopment commission.

9. You refer to G.S. 14-234.1. What is that one about?

G.S. 14-234.1 makes it unlawful, in part, for a city or town council member to use information that is received in an official capacity and which has not yet been made public to "(1) Acquire a pecuniary interest

in any property, transaction, or enterprise or gain any pecuniary benefit which may be affected by such information or official action; or, (2) Intentionally aid another to do any of the above acts."

The North Carolina Public Records Act²⁰ and the Open Meetings Law²¹ are laws promoting broad public access to public records and official meetings. Nevertheless, some areas of public information remain confidential. For example, under the Open Meetings Law, a city council may meet in a closed session and give instructions to its staff about the price and other terms of a contract for purchasing real property.²² If a lawyer council member were to use information received in such a closed session to benefit his or her own or a client's competing proposal for the same property, or to buy up property in the area ahead of the city or town, a violation of the statute would occur. A violation is punishable as a Class 1 misdemeanor.²³ Moreover, it may constitute professional misconduct under Rule 8.4.

10. What about G.S. 133-32, concerning gifts and favors?

One of the responsibilities of a city and town council member is voting to award public contracts.²⁴ That responsibility brings council members under some of the restrictions that are applicable to contracts for public works. G.S. 133-32 regulates the receipt of gifts and favors by officers and employees of governmental agencies from contractors, subcontractors, and suppliers for those agencies. Cities and towns are governmental agencies under the statute.²⁵

The statute makes it unlawful for contractors, subcontractors and suppliers, who have contracts with governmental agencies, to make a gift or give a favor to an officer of a governmental agency who has the duty of awarding public contracts. A town or city council member would be such an officer. The statute also applies if the contractor, subcontractor, or supplier has performed under such a contract during the past year or expects to bid on a contract in the future. There are some exceptions provided by the statute, but they are limited. A violation of G.S. 133-32 constitutes a Class 1 misdemeanor.²⁶ But for the lawyer council member, a violation invites disciplinary action under Rule 8.4 as well.

17. *Handbook, supra* note 2, pages 182 and 183. See RPC 160.

18. *Handbook*, pages 119 through 122. See Rule 8.4.

19. *Handbook*, page 120. See comment [4].

20. G.S.132-1 through 10.

21. G.S. 143-318.8 through 318.18.

22. G.S. 143-318.11(a)(5).

23. G.S. 14-234.1(b).

24. See G.S. 143-128 through 135.8.

25. G.S.133-23.

26. G.S.133-32(b).

11. You mentioned an obscure statute concerning redevelopment commissions. How would that affect me as a council member?

North Carolina cities and towns are authorized to establish redevelopment commissions to deal with problems associated with urban blight.²⁷ These commissions may acquire property in blighted areas, clear the area, and resell the property pursuant to a redevelopment plan.²⁸ They have other powers and duties. They are authorized to enter into a broad range of construction and other contracts in furtherance of their purpose. In lieu of creating a redevelopment commission, cities and towns may take on the powers and duties of a commission themselves or, if a redevelopment commission already exists, abolish the commission and then assume its powers and duties.²⁹ If a town or city council acts as a redevelopment commission, significant limitations on each council member's ability to acquire an interest in redevelopment activities become applicable.

G.S. 160A-511, a more obscure statute than G.S. 14-234.1 and G.S. 133-32, discussed above, bars council members from acquiring "any interest, direct or indirect, in any redevelopment project or in any property included or planned to be included in any redevelopment area, or in any area which he may have reason to believe may be certified to be a redevelopment area, nor shall he have any interest, direct or indirect, in any

contract, or proposed contract for materials or services to be furnished or used by the commission, or in any contract with a redeveloper or prospective redeveloper relating, directly or indirectly, to any redevelopment project." An exception is made if the council member buys a residence for himself or herself from someone who already owns property in the redevelopment area. A violation of the statute constitutes misconduct in office.

Many cities exercise no authority under the Urban Redevelopment Law. Many who do exercise such authority elect to have a redevelopment commission that is a separate municipal corporation. In those cases, the provisions of G.S. 160A-511 would not apply to council members. This statute is mentioned here because of its considerable breadth and because it is another law whose violation by a lawyer council member invites disciplinary action under Rule 8.4 as well.

Conclusion

Holding elected office in local government is an honorable and worthwhile thing. It has its burdens and limitations, however. For the lawyer candidate, that is especially true. A lawyer considering a race for city or town council is well advised to look before leaping.

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27. See G.S. 160A-500 through 526.

28. G.S. 160A-512.

29. G.S. 160A-505.

