Affirmed and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00272 -CV

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PAUL DOUGLAS GONZALES
and KENNETH A. GONZALES, Appellants

V.

BRAZOS RIVER HARBOR NAVIGATION DISTRICT, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 96-M-1580

O P I N I O N

Paul D. Gonzales ("Paul") and Kenneth A. Gonzales ("Kenneth") (collectively, the "Gonzaleses") appeal a take-nothing summary judgment entered in favor of the Brazos River Harbor Navigation District (the "District") on numerous grounds. We affirm.

Background

The District operates the ports of the Brazos River in Brazoria County. Commissioners of the District, also acting as the board of pilot commissioners (the "Board"), are responsible

for pilotage in the Brazos River Ports. *See* TEX. TRANSP. CODE ANN. §§ 68.011, 68.015, 68.017 (Vernon 1999).

On August 30, 1989, Kenneth, a Brazos River Harbor branch pilot, nominated his son, Paul, to fill a vacancy as a deputy branch pilot, subject to the approval of the Board. On January 25, 1990, during a public hearing, the Board considered Paul's application. However, without voting on the nomination, the Board decided that no additional pilots were needed. Effective January 1, 1990, the Brazoria County Pilots Licensing and Regulatory Act[1] (the "Act") became effective, including, among other things, an anti-nepotism provision (the "anti-nepotism provision"), which prohibits the appointment, as a branch deputy pilot, of a person who is related to an existing branch pilot unless unanimously approved by the Brazos Pilots Association (the "Pilots Association").[2] *See* TEX. TRANSP. CODE ANN. § 68.038(c) (Vernon 1999).[3]

On January 19, 1996, Kenneth again nominated Paul as a deputy branch pilot. On February 26, 1996, Paul was adopted by Nell Mayer, a non-pilot. Prior to the meeting to consider his 1996 nomination, Paul requested that the meeting be open to the public. Paul's nomination was initially discussed during a public hearing held on April 18, 1996, and the Board took the matter under advisement, postponing any action until its next meeting. The nomination was again considered during a public hearing held on May 16, 1996, wherein, after a closed deliberation, the Board voted against approval, noting that it was prohibited by the anti-nepotism provision and the lack of a unanimous consent to bypass it.

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1 *See* TEX. TRANSP. CODE ANN. § 68.001-.107 (Vernon 1999).

2 The Brazos Pilots Association is a nonprofit association whose membership is limited to branch pilots for the Brazoria County ports. *See* TEX. TRANSP. CODE ANN. § 68.091 (Vernon 1999).

3 At the time of Paul's 1989 nomination, Article 8272 of the Texas Revised Civil statutes was the applicable law. (CR 19)

The Gonzaleses thereafter filed suit against the Pilots Association, its members, and the District challenging the rejection of Paul's nomination.[4] On October 13, 1997, the trial court: (1) granted a partial summary judgment against the Gonzaleses' causes of action for denial of equal protection, denial of due process, and improper application of the anti-nepotism provision; and (2) denied the Gonzaleses' first motion for summary judgment which had asserted that: (a) Paul was entitled to appointment as a deputy branch pilot pursuant to the 1989 nomination; (b) the anti-nepotism provision did not apply to Paul's 1996 nomination because he had been adopted by a non-pilot third party; (c) the rejection of Paul's 1996 nomination was voidable because the nomination had been deliberated in violation of the Texas Open Meetings Act ("TOMA"); and (d) by deliberating the 1996 nomination in closed session, the Board denied Paul and Kenneth their due process rights under the United States Constitution. All of the defendants except the District were severed out of the case on October 17, 1997. On May 13, 1998, the Gonzaleses filed a second motion for summary judgment alleging that the anti-nepotism provision was an impermissible local law, was not properly noticed prior to its enactment, and denied Paul equal protection. On February 4, 1999, the trial court entered a final, take-nothing judgment in favor of the District and denying the Gonzaleses' second summary judgment motion.[5]

Anti-Nepotism Provision

Improper Delegation of Authority

The Gonzaleses' first point of error argues that the legislative authority to exercise the anti-nepotism provision has been improperly delegated to the individual members of the Pilots Association, *i.e.*, "private individuals," rather than the Board because one member of the Pilots

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[4] The record does not reflect upon what basis Kenneth has standing to seek redress for the adverse action taken against Paul.

[5] Although the trial court entered findings of fact and conclusions of law, we may not consider them on appeal of a summary judgment. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441-42 (Tex. 1997).

Association may block a nomination.[6] The Gonzaleses further argue that the State of Texas lacked authority to pass the anti-nepotism provision because federal law preempts any state regulation of pilotage.

The anti-nepotism provision provides:

> The board may not approve an appointment [of a deputy branch pilot] if the appointee is related to the branch pilot within the second degree by affinity or within the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, unless each member of the Brazos Pilots Association recommends the appointment in writing.

TEX. TRANSP. CODE ANN. § 68.038(c) (Vernon 1999).

It is impossible for the Legislature to express in detail every thing or act required to administer its laws efficiently and practically. *See Texas Nat'l Guard Armory Bd. v. McCraw*, 132 Tex. 613, 626, 126 S.W.2d 627, 635 (Tex. 1939). Therefore, legislation may delegate certain powers and discretion to boards, tribunals, and representatives to carry out certain purposes for which the legislation is enacted.[7] *See id*.

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[6] The Gonzaleses do not assert that the allegedly improper delegation of power violates any particular constitutional provision and cite no authority to affirmatively support this contention. Instead, they attempt only to distinguish *O'Brien*, a case relied upon by the District to show that this type of enactment is not an improper delegation of authority. *See O'Brien v. Amerman*, 112 Tex. 254, 247 S.W. 270 (1922). In *O'Brien*, the validity of several piloting provisions was attacked, one contention being that the articles were void because they empowered the city council to "create new state offices and to fix the qualifications . . . and to establish rates of pilotage and regulations of navigation beyond the city limits." *See id*. at 258, 247 S.W. at 271. The appellants had argued that the Legislature undertook, by virtue of the statutes, to delegate the "nondelegable power of legislation with respect to pilotage to a municipality or to its officers." *See id*. at 257, 247 S.W. at 271. The court determined that although the law's application and execution depended upon the municipality, the Legislature could authorize administrative authorities to provide rules and regulations for its effective execution and enforcement. *See id*. at 259, 247 S.W. at 272. The Gonzaleses note that the facts of *O'Brien* differ somewhat from the facts of this case in that the delegation here was to, as the Gonzaleses state, "private individuals whose interest therein is apparent on the face of the legislation." However, the Gonzaleses do not provide any further authority or argument to show the legal significance of this distinction.

[7] The purpose of the District is to provide for: (1) the improvement, preservation, and conservation of inland and coastal water for navigation; (2) the control and distribution of storm water and floodwater of rivers and streams in aid of navigation; and (3) "any other purposes necessary or incidental to the navigation of inland and coastal water or in aid of these purposes, as stated in Article XVI, Section

The anti-nepotism provision establishes an anti-nepotism rule which the Board may, but is not required to, override if all members of the Pilots Association agree. Although it provides members of the Pilots Association some input in choosing the deputy branch pilots with whom they will work, that input is minor in comparison to that which they are given by the provision requiring that a deputy branch pilot nominee be appointed by a branch pilot in the first place.[8] Moreover, this larger type of power has been upheld by the United States Supreme Court.[9] Therefore, we are not persuaded that the anti-nepotism provision is an improper delegation of legislative authority to the Pilots Association.

In support of their second contention, that federal law preempts the anti-nepotism provision, the Gonzaleses cite *Cooley v. Board of Wardens*, 53 U.S. 299 (1852) and *Gibbons v. Ogden*, 22 U.S. 1 (1824). However, *Cooley* held that states *can* regulate pilots[10] and *Gibbons* is inapposite because it focused on a state's ability to regulate its navigable waters in relation to Congress's power under the commerce clause. *See Gibbons*, 22 U.S. at 182-83.

The Gonzaleses also assert that because the qualifications of a pilot are set forth under

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59, of the Texas Constitution." *See* TEX. WATER CODE ANN. § 62.101 (Vernon 1988). The District is considered a governmental agency and body politic, with the powers of government and with the authority to exercise the rights, privileges, and functions which are essential to the accomplishment of those purposes. *See id.* § 62.102.

[8] *See* TEX. TRANSP. CODE ANN. § 68.034 (Vernon 1999) (To be eligible for a certificate as a deputy branch pilot, a person must: (1) be at least 25 years of age; (2) be a United States citizen; (3) *be appointed by a branch pilot*; (4) be in good mental and physical health; (5) have good moral character; and (6) possess the requisite skill to perform his duties competently and safely).

[9] *See Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552, 562 (1947) (noting that although the practice of allowing branch pilots to select fellow pilots, and to do so from among family members and friends, has been controversial and prohibited in some states, it is not unrelated to the object of achieving a safe and efficient pilotage system); *see generally O'Brien v. Amerman*, 112 Tex. 254, 259-60, 247 S.W. 270, 272 (1922) (rejecting the argument that the port of Houston's pilotage statutes were void because they delegated nondelegable legislative powers).

[10] *See Cooley*, 53 U.S. at 321.

federal law,[11] the State is prohibited from establishing additional qualifications. Again, however, they fail to provide any authority which supports any such prohibition or preemption, and several cases have expressly upheld states' right to regulate pilots.[12] Because the Gonzaleses' first point of error thus fails to establish that the anti-nepotism provision is an improper delegation of authority to the Pilots Association or is pre-empted by federal law, it is overruled.

Local and Special Laws

The Gonzaleses' fourth point of error argues that the trial court erred in failing to set aside the anti-nepotism provision because: (1) it is an impermissible local and special law, in violation of Article III, Section 56, of the Texas Constitution; (2) it was not properly posted prior to its enactment; and (3) it denies Paul his right to equal protection under the law because it applies only to Brazoria County. The Gonzaleses make the same arguments regarding the Brazos Pilots Association law, Sections 68.091 through 68.107 of the Transportation Code. The Gonzaleses further argue that should we decide that the District is authorized under Article XVI, Section 59 of the Texas Constitution,[13] it is still impermissible to impose "unique rules and regulations on a class of individuals who are not demonstrably different than similarly classed individuals in other regions."

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[11] *See* TEX. TRANSP. CODE ANN. §§ 61.011 (Vernon 1994) (requiring any state-commissioned pilot to be licensed under federal law); 68.033(7) (Vernon 1999) (requiring that a branch pilot be licensed under federal law).

[12] *See Kotch*, 330 U.S. at 559 (recognizing the States' long standing power to regulate pilotage); *Olsen v. Smith*, 68 S.W. 320 (Tex. Civ. App.–Galveston 1902, writ ref'd) (noting that the object of laws governing the qualifications and appointments of branch pilots was to "protect life and property from the perils incident to navigation" and were universally observed and enforced); *Petterson v. Board of Comm'rs of Pilots for Port of Galveston*, 57 S.W. 1002, 1005 (Tex. Civ. App.–Galveston 1900, writ ref'd) (upholding provisions governing the appointment and qualifications of the port of Galveston's deputy branch pilots).

[13] Article XVI, Section 59 provides that the Legislature shall pass all laws appropriate to the navigation of its inland and coastal waters. *See* TEX. CONST. art. XVI, § 59. The District was created pursuant to Article XVI, Section 59. *See Smith v. Wilson*, 13 F.2d 1007, 1008 (S. D. Texas 1926).

An analysis of the constitutionality of a statute begins with a presumption of validity. *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996). If possible, courts should interpret statutes in a manner that avoids constitutional infirmities. *See Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998). Article III, Section 56 of the Texas Constitution provides, in part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . :
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> Regulating the affairs of counties, cities, towns, wards or school districts;
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> And in all other cases where a general law can be made applicable, no local or special law shall be enacted . . . .

TEX. CONST. art. III, § 56. A local law is one limited to a specific geographic region of the State, while a special law is limited to a particular class of persons distinguished by some characteristic other than geography. *See Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996). The purpose of Article III, Section 56 is to prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible. *See id*.

A law is not a prohibited local law merely because it applies only in a limited geographical area. *See id*. The Legislature's broad authority to make classifications for legislative purposes is well recognized. *See id*. However, where a law is limited to a particular class or affects only the inhabitants of a particular locality, the classification must be broad enough to include a substantial class and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation. *See id*. Thus, the ultimate question in determining if a law is local under Article III, Section 56, is whether there is a reasonable basis for the Legislature's classification. *See Maple Run*, 931 S.W.2d at 947. Before an enactment is struck down as coming within the proscriptions of Article III, Section 56, it must be apparent

that there is no reasonable basis for the classification adopted by the legislature. *See Cameron*, 160 Tex. at 31, 326 S.W.2d at 167.[14]

It is well settled that Article XVI, Section 59 authorizes the Legislature to pass local legislation creating specific conservation and reclamation districts without violating the provisions of article III, Section 56. *See Maple Run*, 931 S.W.2d at 948; *see also Cameron County v. Wilson*, 160 Tex. 25, 29, 326 S.W.2d 162, 165 (1959). To accomplish its purposes, Section 59 also provides that the districts created pursuant to it are "governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law." TEX. CONST. art. XVI, § 59(b); *see Maple Run*, 931 S.W.2d at 948. However, Section 59 does not authorize the Legislature to intimately regulate the financial affairs of a specific community - without that community's consent - in the name of conservation. *See id*. at 949.

Citing to *Maple Run*, the Gonzaleses assert that the anti-nepotism provision is a prohibited local law because there could be no reasonable basis to treat pilots in Brazoria County differently than pilots in other counties. Although the anti-nepotism provision applies only to Brazoria County, the provision exists within a subtitle of the Transportation Code

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[14] *Compare County of Cameron v. Wilson*, 160 Tex. 25, 326 S.W.2d 162 (1959) (upholding a law affecting only counties bordering the Gulf of Mexico and concluding that the coastal geography of Texas afforded a reasonable distinction between those counties benefitting from the law and those which did not); *and Robinson v. Hill*, 507 S.W.2d 521 (Tex. 1974) (upholding the imposition of bail bond regulations on counties with populations of more than 150,000, because larger counties had a greater incidence of crime and difficulties enforcing bond forfeitures which warranted limiting the regulation to those counties); *with Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000, 1002 (1941) (invalidating a law authorizing economic development in counties falling within specific population brackets because the brackets bore no substantial relation to the purposes of the enactment); *City of Fort Worth v. Bobbitt*, 121 Tex. 14, 36 S.W.2d 470, 471-72 (1931) (invalidating a public works law applying to counties with a population of 106,000 to 110,000 because the brackets advanced no legitimate purpose and were a means to merely single out one city for special treatment); *and Bexar County v. Tynan*, 128 Tex. 223, 97 S.W.2d 467, 470 (1936) (invalidating a law which reduced the compensation of certain officers in counties with a population of 290,000 to 310,000 because the classification was unreasonable and indicated that the law had been enacted to single out one county to legislate the compensation of its officers).

containing separate chapters which pertain to individual navigation districts within the State.[15] Each of the chapters contains provisions the others do not. As among other political subdivisions of the State, and by practical necessity, the minimum qualifications for comparable public officers vary somewhat among navigation districts.[16] The Gonzaleses have not cited and we have not found any cases suggesting that Article III, Section 56, restricts the latitude of local governmental units to seek, or the Legislature to pass, statutes containing such variations. Nor can we perceive any rationale for such a restriction. Therefore, we reject the Gonzaleses' contention that the anti-nepotism provision is an unconstitutional local or special law.

The Gonzaleses also contend that, even if the statutes in question are in fact permissible special or local laws, they were not noticed as required by law. On the contrary, the District provided proof that the requisite notice was published in a local newspaper, the Brazosport Facts, on February 3, 1989, thirty days prior to the introduction of the bill as required under the law. *See* TEX. CONST. art. 3, § 57; TEX. GOV'T CODE ANN. §§ 313.002, 313.004 (Vernon 1998). Therefore, the Gonzaleses have failed to demonstrate that the laws were not properly noticed.

Finally, under this point of error, the Gonzaleses make the following assertion:

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[15] For example, Chapter 65 governs pilots for Matagorda and Lavaca Bays, Chapter 66 governs pilots for Harris County, Chapter 67 governs Galveston pilots, and Chapter 68 governs Brazoria County pilots.

[16] For example, to be eligible for a deputy branch pilot certificate for the ports of Galveston, Brazoria County, and Corpus Christi, a person must be appointed by a branch pilot, whereas to do so for the port of Houston, no such requirement is provided in the statute. *Compare* TEX. TRANSP. CODE ANN. §§ 67.034(3) (Galveston County), 68.034(3) (Brazoria County), 70.033(3) (Corpus Christi) (Vernon 1999), *with* TEX. TRANSP. CODE ANN. § 66.034 (Vernon 1999) (Houston). Similarly, to be eligible for a branch pilot's license: (1) a person must be less than 68 years of age in Houston and Brazoria County, but no such maximum age is specified for Galveston or Corpus Christi; (2) Houston requires one year of continuous state residency whereas Galveston, Brazoria County, and Corpus Christi require two; and (3) Houston requires three years of service as a deputy branch pilot whereas only two such years experience are required in Galveston, Brazoria County, and Corpus Christi. *See* TEX. TRANSP. CODE ANN. §§ 66.033, 67.033, 68.033, 70.033 (Vernon 1999).

> Appellants further attach (sic) the two provisions in question on the basis that their application does not provide [the Gonzaleses] with equal protection of the law. Where Kenneth A. Gonzales is in a class singled out by geography, and at no other appropriate distinction, to be a member of the Brazos Pilots Association and subject to the anti-nepotism provision, then he suffers from a denial of equal protection of the law.

However, because the Gonzaleses provide no authority or additional argument on this contention, it affords no basis upon which it can be sustained. *See* TEX. R. APP. P. 38.1(h); *Rauscher Pierce Refnes, Inc. v. Great Southwest Savings, F.A.*, 923 S.W.2d 112, 116 (Tex. App.–Houston [14th Dist.] 1996, no writ); *Franklin v. Enserch, Inc.*, 961 S.W.2d 704, 711 (Tex. App.–Amarillo 1998, no writ). Therefore, we overrule the Gonzaleses' fourth point of error.

Paul's Adoption

The Gonzaleses' fifth point of error claims that the trial court erred in applying the anti-nepotism provision to Paul's nomination because he had been adopted, while an adult, by a non-pilot third party.[17] As previously noted, the anti-nepotism provision generally prohibits the Board's approval of a deputy pilot who is related to a branch pilot as specified by the statute. *See* TEX. TRANSP. CODE ANN. § 68.038(c) (Vernon 1999). Two individuals are so related to each other if: (1) one is a descendant of the other, or (2) they share a common ancestor. *See* TEX. GOV'T CODE ANN. § 573.022 (Vernon 1994). "An adopted child is considered to be a child of the adopted parent for this purpose." *See id*.

Because of this latter provision, the Gonzaleses assert that Paul is now the child of *only* his adopted parent and no longer the child of Kenneth for purposes of applying the anti-nepotism provision. However, the adult adoption provisions appear to exist largely, if not entirely, for the purpose of creating heirship in non-family members for inheritance

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[17] *See* TEX. FAM. CODE ANN. §§ 162.501-.507 (Vernon 1996) (governing adult adoptions in Texas).

purposes.[18] The Gonzaleses have cited no authority suggesting that the adoption of an adult terminates the parental relationship between the adopted adult and their natural parent(s). Moreover, the fact that an adopted adult is considered the child of his adoptive parent for purposes of Section 573.022 does not dictate that the adopted adult is no longer also the child of his natural parent(s) for that purpose, especially where, as here, the identity of the natural parent is known, and the parental rights of the natural parent were never terminated. *See* TEX. R. APP. P. 38.1(h). Therefore, the Gonzaleses' fifth point of error fails to demonstrate error in applying the anti-nepotism provision to Paul, as the son of Kenneth, and is overruled.

Application of the Prior Statute

The Gonzaleses' sixth point of error claims that the trial court erred in applying the anti-nepotism provision to Paul's 1996 nomination because the law governing appointments prior to its enactment should have been applied. This contention is, in turn, based on the assertion that because the Board did not specifically take action on Paul's 1989 application in its January 1990 meeting, his 1996 re-application is still subject to the pre-1990 law, which did not contain an anti-nepotism provision. The Gonzaleses also rely on a statement made at the time by the Pilot Board Chairman that, because Paul's first application was sent in and received prior to January 1, 1990, it should not be subject to the anti-nepotism law which became effective on that date. We disagree.

The Board was authorized in 1990 to determine the number of pilots it needed.[19] Its determination that no additional pilots were needed at that time had the effect of eliminating the pending vacancy. Because a vacancy no longer existed, there could be no nomination pending to fill it. The Board's decision that no additional pilots were needed thereby amounted to an action terminating Paul's 1989 nomination. When Paul's 1996 nomination was

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[18] *See generally* 9 ALOYSIUS A. LEOPOLD & GERRY W. BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 5.12-.20 (1992 & Supp. 2000); JOHN J. SAMPSON ET. AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 706 (9th ed. 1999).

[19] *See* TEX. REV. CIV. STAT. ANN. art. 8280c, § 2.08 (Vernon 1989).

submitted, it was subject to the laws then in effect, including the anti-nepotism provision. Accordingly, the Gonzaleses' sixth point of error is overruled.

Texas Open Meetings Act

The Gonzaleses' second and third points of error assert that the trial court erred in failing to set aside the rejection of Paul's nomination by the Board because: (1) the Board failed to allow Paul to attend an executive session addressing his nomination, violating TOMA and Paul's right to due process of law and equal protection; and (2) the rejection resulted from closed deliberations of the Board which were not properly noticed under TOMA. The Gonzaleses argue that because deliberations were conducted in a closed session, the decision to reject Paul's nomination is a voidable act under Section 551.141 of the Texas Government Code.

TOMA applies to actions and proceedings under the Act. *See* TEX. TRANSP. CODE ANN. § 68.020 (Vernon 1999). Under TOMA, every regular, special, or called meeting of a governmental body shall be open to the public. *See* TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994). An exception to the open meeting requirement applies if the governmental body is deliberating the appointment of a public officer or employee. *See id*. § 551.074(a). However, if a public officer or employee who is the subject of the deliberation requests a public hearing, then the exception does not apply. *See id*. § 551.074(b).[20] Nevertheless, it is not a violation of TOMA to recess a mandatory open meeting to deliberate in closed session if the employee or officer requesting the open meeting does not timely object to the closed deliberation. *See United Indp. Sch. Dist. v. Gonzalez*, 911 S.W.2d 118, 127 (Tex. App.–San Antonio 1995, writ denied); *Bowen v. Calallen Indp. Sch. Dist.,* 603 S.W.2d 229, 236 (Tex. Civ. App.–Corpus Christi 1980, writ ref'd n.r.e.). An action taken by a governmental body in violation of TOMA is voidable. *See id*. § 551.141.

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[20] In addition, a final action, decision, or vote on a matter deliberated in a closed meeting may only be made in an open meeting held in compliance with TOMA. *See id.* § 551.102.

The Gonzaleses first contend that deputy pilots are not employees of the Board or public officers subject to the exception pertaining to deliberations on their appointment, but are instead independent contractors.[21] However, it is not contended that pilots are employees of the Board, and pilots have been deemed public officers,[22] for which the concept of independent contractor has no application. The Gonzaleses argue alternatively, that if pilots are public officers, then Paul's request for an open meeting, under Section 551.074 of the Texas Government Code required the Board to have an open deliberation regarding his application which it failed to do. However, because Paul failed to object to the Board's recessing the open meeting and reconvening for closed deliberations, any violation of TOMA was waived. *See United Indp. Sch. Dist.*, 911 S.W.2d at 127; *Bowen*, 603 S.W.2d at 229.

The Gonzaleses also assert that the attendance of Leland Kee, General Counsel for the Board, at the executive session regarding Paul's nomination violated Section 551.071, Texas Government Code.[23] However, this provision, as previously enacted,[24] has been interpreted to allow closed discussions with an attorney regarding legal, as contrasted from policy, matters

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[21] As authority for this proposition, Gonzales cites to *Steinhort*, a tax case in which the taxpayer was a branch pilot contesting the decision of the tax court regarding his deductions of transportation costs to and from work. *See Steinhort v. Commissioner of Internal Revenue*, 335 F.2d 496, 499 (5th Cir. 1964) The *Steinhort* opinion stated that "[p]ilotage . . . is however, a service supplied by the individual whose relationship *toward the vessel* is comparable to an independent contractor. . . ." *See id*. at 499 (citations omitted) (emphasis added). The Transportation Code similarly recognizes that although each pilot is a member of the association, he acts as an independent contractor in performing pilotage services *for a vessel owner or consignee.* *See* TEX. TRANSP. CODE ANN. § 68.096 (Vernon 1999). The fact that a pilot may be an independent contractor of a vessel owner is of no relevance to the application of TOMA.

[22] *See Petterson v. Board of Comm'rs of Pilots for Port of Galveston*, 57 S.W. 1002, 1006-07 (Tex. Civ. App.–Galveston 1900, writ ref'd).

[23] Section 551.071 provides that a governmental body may not conduct a private consultation with its attorney except: (1) when the governmental body seeks the advice of its attorney regarding pending or contemplated litigation, or a settlement offer; or (2) on a matter in which the duty of the attorney to the governmental body under the Texas Rules of Disciplinary Rules of Professional Conduct clearly conflicts with TOMA. *See* TEX. GOV'T CODE ANN. § 551.071 (Vernon 1994).

[24] *See* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(e) (Vernon 1970).

for which the attorney would have an ethical duty of confidentiality. *See* Op. Tex. Att'y Gen. No. JM-100 (1983). To the extent the Board discussed with Kee the application of the anti-nepotism provision to Paul's nomination, the Gonzaleses have not demonstrated that such a legal matter was ineligible for discussion in a closed session.

In addition, citing to Attorney General opinion 1971 No. M-1005, the Gonzaleses state that a public body must post notice of an open or closed meeting with its attorney if matters of official or public business are to be discussed with him. However, the Gonzaleses cite no provision of TOMA setting forth any such notice requirement, and opinion No. M-1005 has since been acknowledged to no longer reflect current law. *See* Op. Tex. Att'y Gen No. H-1281 (1978).

Citing sections 68.033 and 68.034 of the Transportation Code, the Gonzaleses further argue that once an individual has been appointed a deputy branch pilot and meets the statutory qualifications, the Pilot Board *must* approve his nomination. However, those sections list the statutory qualifications required to be *eligible* for a license as a branch pilot or a certificate as a deputy branch pilot. *See* TEX. TRANSP. CODE ANN. §§ 68.033, 68.034 (Vernon 1999). Neither provision specifies that, having met the requirements, an individual *must* be approved by the Board, and such a reading would ignore other provisions of the Act, such as the provision stating that the appointment of a deputy branch pilot is subject to board approval, the anti-nepotism provision, and the provision authorizing the Board to determine how many pilots are necessary. *See* TEX. TRANSP. CODE ANN. §§ 68.017, 68.038 (a),(c). Moreover, because the Board is not required to certify every deputy branch pilot nominee who meets the eligibility criteria, such nominees do not have a protected property interest in that position which is subject to due process requirements. *See University of Texas v. Than*, 901 S.W.2d 926, 929 (Tex. 1975). Because the Gonzaleses' second and third points of error therefore fail to demonstrate a violation of TOMA, due process, or equal protection, they are overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Justices Yates, Hudson, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).