

# Chapter | Ten

## Personal Liability of Councilmembers

doctrine in Texas since the passage in 1969 of the Tort Claims Act (Chapter 101 of the Civil Practice and Remedies Code). A "tort" is a wrongful act that results in injury to persons or property. A tort can result from negligence in the proper performance of a public servant's duty, or from such intentional acts as libel, false arrest, or slander.

Under state law, cities and other governmental units may be financially liable for property damage, personal injuries, and deaths "proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office."

Within the context of the Tort Claims Act, governmental liability hinges on three elements: (1) existence of a legal duty on the part of the city; (2) breach of that duty; and (3) damage to a person or property as a result of the breach of duty.

Under the Tort Claims Act, city governments are liable for damages resulting from the actions of councilmembers and other city officials. But what of the *individual* liability of mayors and councilmembers? Can these persons be held *personally* responsible for damages resulting from decisions they make (or refuse to make) in their official capacity as members of the city council?

### Public Official Liability

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City councils across the state each day make decisions that affect the lives and property of thousands of people. Using their best judgment to determine who should be awarded city contracts, the decisions of councilmembers can mean the difference between prosperity and insolvency for equipment dealers, office suppliers, and other businesses. Policies set by the council guide the actions of police officers who wield life and death powers. The list goes on and on. The point is that councilmembers make a variety of decisions that can benefit many persons and lead to irreparable harm to others.

Until recently, the federal courts generally held that councilmembers were not personally liable for torts resulting from their official actions, so long as those actions were made in good faith—that is, without willful or malicious intent to do harm. But that is no longer necessarily the case. There are indications now of an emerging concept of "public official malpractice" with serious implications for city officials, which is borne out by a significant increase in the number of lawsuits filed against councilmembers and other public officials.

These developments point to a situation calling for mayors and

councilmembers to be aware of their potential liability problems and to have a basic understanding of the legal principles involved.

### Liability Under State Law

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Generally speaking, Texas courts have held that councilmembers are not personally liable for torts resulting from "discretionary acts" made within their authority and in "good faith"—that is, without intent to do harm.

"Discretionary acts" are those involving personal judgment. For a councilmember, typical discretionary acts include approving amendments to the city's zoning or subdivision ordinance or awarding bids. Each of these acts involves decisions, or choices, based on the councilmember's personal conclusions from all of the available facts.

There is little case law to look to with regard to personal liability of mayors and councilmembers for torts resulting from their discretionary acts. Among the handful of pertinent cases, one concerns a mayor who, acting by himself, initiated legal proceedings against a delinquent property taxpayer. The taxpayer then sued the mayor for damages, claiming the mayor had no individual legal power to order the city attorney to file suit, because state law requires the city council to authorize such suits. The court agreed, declared the mayor's act was "wholly without authority of law," and ruled that he was personally liable for damages.

Again, generally speaking, councilmembers are personally liable for torts resulting from their ministerial acts. "Ministerial" acts are those performed as a matter of duty and which the council must perform. Ministerial acts also include those performed in obedience to state or federal laws which are so plain and explicit as to leave nothing to discretion or judgment. Examples include adoption of the city budget and canvassing the results of city elections.

An improper ministerial act imperils the councilmember, regardless of whether it was performed in good faith without intent to do harm. A ministerial act which is required by law, but is not performed at all, also leads to liability on the part of the councilmembers responsible for its performance. This means that a councilmember could be personally liable for paying damages to individuals injured because of the council's failure to properly perform a ministerial duty or its negligence in not performing it at all.

Personal liability of most city officials and employees is capped at

\$100,000 for actions brought in state court. This limitation of liability applies if a city provides insurance, self-insurance, or indemnification for its officers and employees. The advice of the city attorney should be sought on any specific liability question in a given situation.

## Liability Under Federal Law

During the 1950s and 1960s, the federal courts generally held that mayors and councilmembers enjoyed "qualified" immunity from liability for their tortious acts. In order to be eligible for immunity, a local official had to meet two qualifications: (1) he or she had to be acting in a ministerial capacity—that is, performing an act that he or she was legally required to perform; and (2) it had to be demonstrated that the act in question was made in good faith.

Beginning in the 1970s, the federal courts began to narrow the scope of a local official's immunity from personal liability for official acts. First, in 1974, the U.S. Supreme Court held that when a public official acts under state law in a manner that violates the U.S. Constitution, "he comes into conflict with the superior authority of that Constitution and is stripped of his official or representative character and *subjected in his person to consequences of his individual conduct.* . . ." The Court thus held that a councilmember is personally liable for damages if he or she votes to have the city perform an act that has the effect of depriving citizens of their constitutional rights—even in cases where the councilmember and the city are required by state law to perform the particular act.

## Civil Rights Liability

Civil rights represent another area in which local officials can be held personally liable for damages. Every councilmember needs to know the risks expressly contained in Section 1983, Title 42, of the United States Code:

*"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."*

The literal language of Section 1983 makes all persons, councilmembers included, personally liable for damages if their acts result in depriving others of their civil rights, regardless of whether such acts were reasonable and made in good faith. Additionally, the U.S. Supreme Court has held that Section 1983 does not require proof that a defendant deliberately intended to deprive the plaintiff of his legal rights; the mere deprivation is itself a violation.

Liability under Section 1983 is not limited to the direct infliction of physical injuries to persons or property. Several types of policy decisions affecting city employees or citizens could render coun-

cilmembers liable under Section 1983, depending on the specific facts of the situation. An example of potential liability under Section 1983 would be the council's decision to deny a developer the right to use land by denying a rezoning or building permit to the developer because the construction plans are opposed by a vocal neighborhood group.

Another significant area of potential liability for councilmembers under Section 1983 relates to race discrimination and other violations of the Equal Protection Clause of the U.S. Constitution, such as sex-biased personnel policies and practices.

## Avoiding Liability

Unfortunately, there is no way for city officials to totally avoid personal liability, because absolute immunity is nonexistent. Threats of personal liability can be limited, however, by ensuring scrupulous regard for the legal rights of those with whom the city government comes in contact.

Maintaining respect for the rights of those with whom the city comes into contact in the performance of its duties is not always easy, for here, as in the area of criminal law, the beneficiaries of the law sometimes are people whose only purpose, it seems, is to goad public officials into intemperate action.

No councilmember should ever hesitate to admit lack of knowl-