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Sovereign and Governmental Immunity in the Land-Use Regulation Context

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I. Introduction.

State and local governmental entities generally enjoy immunity from lawsuits. Suing or defending a governmental entity or its employees in a land-use case can raise numerous issues, including: the nature of immunity, the classification of the governmental action, and the identity of the defendant (i.e., the government entity or government officials). Although claims arising from land-use regulations can implicate federal legal issues, this paper focuses on Texas law.

II. Immunity generally.

A. Sovereign and Governmental Immunity provide a defense to suits brought against the governmental entity and governmental agents sued in their official capacity.

Although often used interchangeably, the terms sovereign immunity and governmental immunity “involve two distinct concepts.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

Sovereign immunity protects the State and divisions of state government (including agencies, boards, hospitals, and universities) from lawsuits for damages. *Id.*; *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Sovereign immunity embraces two distinct principles: immunity from suit and immunity from liability. *Fed. Sign*, 951 S.W.2d at 405.

Governmental immunity protects “political subdivisions of the State, including counties, cities, and school districts.” *Taylor*, 106 S.W.3d at 694 n.3. Like sovereign immunity, it also encompasses immunity from suit and from liability. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

Immunity from *suit* bars a suit against a governmental entity without the State’s consent. *Id.* Even if the State concedes liability, immunity from suit prevents a lawsuit from being maintained to seek a remedy, unless the State consents, either through a constitutional provision or legislative action. *Taylor*, 106 S.W.3d at 695; *Fed. Sign*, 951 S.W.2d at 405. The Legislature may consent by statute or by legislative resolution.¹ A statutory waiver of immunity must be “effected by clear and unambiguous language.” Tex. Gov’t Code Ann. § 311.034, *cited in Taylor*, 106 S.W.3d at 696.

¹ A person may seek the Legislature’s permission to sue “state or any of the agencies of government that collectively constitute the government of this state, including agencies, departments, bureaus, boards, commissions, office, councils, courts, and institutions of higher education” under Chapter 107 of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. §§ 107.001–.005. For a claimant seeking permission to sue for breach of certain contracts against a “unit of state government” (as defined by statute), the alternate dispute resolutions procedures of Chapter 2260 of the Government Code are exclusive and are required to be followed prior to seeking the Legislature’s permission to sue. Tex. Gov’t Code Ann. §§ 2260.001–.108.

Immunity from *liability* prevents enforcement of a judgment, even if the Legislature has given consent to sue. *Fed. Sign*, 951 S.W.2d at 405. The Legislature does not create or admit liability by granting permission to sue. *Id.* Unlike immunity from suit, immunity from liability is not a jurisdictional bar.

Under Texas law, a suit against a government employee in his official capacity is a suit against his government employer. *Franka v. Velasquez*, 332 S.W.3d 367, 382 (Tex. 2011). Thus an employee sued in his official capacity has the same immunity as the governmental employer. *Id.* at 282–83. There is one exception to this general rule: a suit alleging that the employee acted *ultra vires*; that is, acting without any authority or failing to perform a purely ministerial act. *Id.* at 382 & n.9 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372, 373 (Tex. 2009)).

B. Immunity defenses for governmental officials sued in individual capacity.

Although sovereign or governmental immunity applies to suits against government officials in their official capacities, *see Franka*, 332 S.W.3d at 382, officials sued in their individual capacities are not without defenses.

A government employee may be individually liable for his own torts, even when committed in the course of employment, and suit may be brought against government employees in his individual capacity. *Id.* at 383. However, governmental employees may assert official immunity “from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.” *Id.* Official immunity is not a jurisdictional bar; rather, it is an affirmative defense to personal monetary liability available to an official sued in his or her *individual* capacity. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Qualified immunity is the analogous affirmative defense to federal section 1983 claims against public officials. *York v. State*, 298 S.W.3d 735, 753 (Tex. App.—Fort Worth 2009), *rev’d on other grounds*, 373 S.W.3d 32 (Tex. 2012). Official immunity and qualified immunity are sometimes used interchangeably, along with other terms such as “quasi-judicial immunity,” “discretionary immunity,” “official immunity,” and “good faith immunity.” *See City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993).

The defense applies if the official is performing discretionary duties, rather than ministerial duties. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex. 2004) (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994)). Ministerial duties are those for which “the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Id.* (quoting *Comm’r of the Gen. Land Office v. Smith*, 5 Tex. 471, 479 (1849)). “If the public official must obey an order, without having any choice in complying, the act is ministerial.” *Id.* (citing *Chambers*, 883 S.W.2d at 654). For example, a police officer “engaging in a high-speed chase was a discretionary act,” *Chambers*, 883 S.W.2d at 655, but an officer “operating a car in a nonemergency situation is a ministerial function,” and has no discretion to disobey traffic laws. *Victory v. Faradineh*, 993 S.W.2d 778, 780 (Tex. App.—Dallas 1999, no pet.)

The determination of whether an official acted in good faith is an objective inquiry. *Id.* at 426. The inquiry is “whether a reasonably prudent official, under the same or similar

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