

**Presented:**  
19th Annual Land Use Conference

March 26–27, 2015  
Marriott Austin North  
Round Rock, TX

## **Sovereign and Governmental Immunity in the Land-Use Regulation Context**

**Eric C. Farrar**

Author contact information:  
Eric C. Farrar  
Olson & Olson LLP  
Houston, TX

[efarrar@olsonllp.com](mailto:efarrar@olsonllp.com)  
713-533-3800

**TABLE OF CONTENTS**

**I. Introduction.....1**

**II. Immunity generally.....1**

**A. Sovereign and Governmental Immunity provide a defense to suits brought against the governmental entity and governmental agents sued in their official capacity .....1**

**B. Immunity defenses for governmental officials sued in individual capacity.....2**

**III. Immunity in the Land-Use Regulation context.....3**

**A. Takings claims against governmental entity .....3**

**B. Other claims that may be involved in a takings case.....8**

**IV. Asserting Immunity .....11**

**V. Identifying the client when representing a governmental entity.....13**

## INDEX OF AUTHORITIES

<u>CASE</u>	<u>PAGES</u>
<i>Agins v. City of Tiburon</i> , 447 U.S. 255 (1980).....	5
<i>Ballantyne v. Champion Builders, Inc.</i> , 144 S.W.3d 417 (Tex. 2004).....	2
<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547 (Tex. 2000).....	11
<i>Bogan v. Scott–Harris</i> , 523 U.S. 44 (1998).....	3
<i>Bryan v. City of Madison</i> , 213 F.3d 267 (5th Cir. 2000) .....	3
<i>Cameron County v. Hinojosa</i> , 760 S.W.2d 742 (Tex. App.—Corpus Christi 1988, no writ) .....	14
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009).....	2
<i>City of Houston v. Kilburn</i> , 849 S.W.2d 810 (Tex. 1993).....	2
<i>City of Lancaster v. Chambers</i> , 883 S.W.2d 650 (Tex. 1994).....	2, 12
<i>Clear Lake City Water Auth. v. Salazar</i> , 781 S.W.2d 347 (Tex. App.—Houston [14th Dist.] 1989, no writ) .....	3
<i>Comm’r of the Gen. Land Office v. Smith</i> , 5 Tex. 471 (1849).....	2
<i>Connolly v. Pension Benefits Guar. Corp.</i> , 475 U.S. 211 (1986).....	6
<i>City of Elsa v. Gonzalez</i> , 325 S.W.3d 622 (Tex. 2010).....	12
<i>City of Houston v. Mack</i> , 312 S.W.3d 855 (Tex. App.—Houston [1st Dist.] 2009, no pet.) .....	12

<i>City of Houston v. Trail Enterprises, Inc.</i> , 377 S.W.3d 873 (Tex. App.—Houston [14th Dist.] 2012, pet. denied), cert denied, 135 S. Ct. 76 (2014).....	8
<i>Dallas County v. Halsey</i> , 87 S.W.3d 552 (Tex. 2002) .....	3
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994).....	5, 6
<i>Dombrowski v. Eastland</i> , 387 U.S. 82 (1967).....	3
<i>Edwards Aquifer Authority v. Day</i> , 369 S.W.3d 814 (Tex. 2012).....	4-7
<i>Fed. Sign v. Texas S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997).....	1, 2
<i>Franka v. Velasquez</i> , 332 S.W.3d 367 (Tex. 2011).....	2
<i>General Servs. Comm’n v. Little–Tex Insulation Co., Inc.</i> , 39 S.W.3d 591 (Tex. 2001).....	4
<i>Gravel v. United States</i> , 408 U.S. 606 (1972).....	3
<i>Harlandale Indep. Sch. Dist. v. Cornyn</i> , 25 S.W.3d 328 (Tex. App.—Austin 2000, pet.) .....	15
<i>Hearts Bluff Game Ranch, Inc. v. State</i> , 381 S.W.3d 468 (Tex. 2012).....	4
<i>Howeth Investments, Inc. v. City of Hedwig Vill.</i> , 259 S.W.3d 877 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).....	8-11
<i>In re Perry</i> , 60 S.W.3d 857 (Tex. 2001).....	3
<i>Kentucky v. Graham</i> , 473 U.S. 159 (1985).....	11
<i>Killam Ranch Properties, Ltd. v. Webb County</i> , 376 S.W.3d 146 (Tex. App.—San Antonio 2012, pet. denied) .....	14, 15

<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005).....	4-6
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	5
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).....	5
<i>Mayhew v. Town of Sunnyvale</i> , 964 S.W.2d 922 (Tex. 1998).....	4, 5, 8, 11, 13
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825 (1987).....	5-8
<i>Penn Central Transp. Co. v. New York City</i> , 438 U.S. 104 (1978).....	6-8
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922).....	5
<i>Sheffield Development Co. v. City of Glenn Heights</i> , 140 S.W.3d 660 (Tex. 2004).....	4-8
<i>State Dep’t of Highways &amp; Pub. Transp. v. Gonzalez</i> , 82 S.W.3d 322 (Tex. 2002).....	11
<i>State v. Holland</i> , 221 S.W.3d 639 (Tex. 2007).....	12
<i>State v. DeAngelis</i> , 116 S.W.3d 396 (Tex. App.—El Paso 2003, no pet.).....	21
<i>Steele v. City of Houston</i> , 603 S.W.2d 786 (Tex. 1980).....	3, 4
<i>Stump v. Sparkman</i> , 435 U.S. 349 (1978).....	3
<i>Telthorster v. Tennell</i> , 92 S.W.3d 457 (Tex. 2002).....	3
<i>Tex. A &amp; M Univ. Sys. v. Koseoglu</i> , 233 S.W.3d 835 (Tex. 2007).....	2, 12

<i>Tex. Dep't of Parks &amp; Wildlife v. Miranda</i> , 133 S.W.3d 217 (Tex. 2004).....	12
<i>Texas Dep't of Transp. v. A.P.I. Pipe &amp; Supply, LLC</i> , 397 S.W.3d 162 (Tex. 2013) .....	4
<i>Texas Dept. of Transp. v. Sefzik</i> , 355 S.W.3d 618 (Tex. 2011) .....	11
<i>Texas State Bd. of Pub. Accountancy v. Bass</i> , 366 S.W.3d 751 (Tex. App.—Austin 2012, no pet.) .....	14, 15
<i>Tooke v. City of Mexia</i> , 197 S.W.3d 325 (Tex. 2006).....	1
<i>Town of Flower Mound v. Stafford Estates Ltd. P'ship</i> , 135 S.W.3d 620 (Tex. 2004) .....	5, 6
<i>Univ. of Texas Sw. Med. Ctr. of Dallas v. Margulis</i> , 11 S.W.3d 186 (Tex. 2000).....	12
<i>Victory v. Faradineh</i> , 993 S.W.2d 778 (Tex. App.—Dallas 1999, no pet.).....	2, 3
<i>Webster v. Texas &amp; Pacific Motor Transport Co.</i> , 166 S.W.2d 75 (Tex. 1942).....	15
<i>Wichita Falls State Hosp. v. Taylor</i> , 106 S.W.3d 692 (Tex. 2003).....	1
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	4, 5
<i>York v. State</i> , 298 S.W.3d 735 (Tex. App.—Fort Worth 2009), <i>rev'd on other grounds</i> , 373 S.W.3d 32 (Tex. 2012).....	2

**STATUTES AND RULES**

**PAGES**

**U.S. CONST. AMEND.**

V.....	4
--------	---

**TEX. CONST. ART. I**

§ 17(a).....	4
--------------	---

**TEXAS GOV'T CODE ANN.**

§ 311.034.....	1
§ 551.002.....	14
§ 551.071.....	14
§ 552.021.....	15
§ 552.107.....	15
§ 2260.001-108 .....	1

**TEX. CIV. PRACTICE & REMEDIES CODE**

§ 37.006(b).....	11
§ 37.001-.011.....	11
§ 51.014.....	13
§ 101.001-.009.....	11, 13
§ 101.021.....	11
§ 107.001-.005 .....	1

**TEX. DISCIPLINARY R. PROF. CONDUCT**

1.05.....	13, 14
1.12.....	13, 14

**ADDITIONAL SOURCES**

**PAGES**

Op. Tex. Att’y Gen. No. JC-0233 (2000) .....	14, 15
Op. Tex. Att’y Gen. No. JM-100 (1983).....	15
Op. Tex. Att’y Gen. No. JM-1004 (1989) .....	15
Opinion 296, October 1964, (reprinted in 18 Baylor L. Rev. 363 (1966)) (accessed via <a href="https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-296.aspx">https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-296.aspx</a> ).....	15
Opinion 274, November 1963 (reprinted in 18 Baylor L. Rev. 274 (1966)) (accessed via <a href="https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-274.aspx">https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-274.aspx</a> ).....	15

## 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.<sup>1</sup> 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.

---

<sup>1</sup> 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

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Sovereign and Governmental Immunity in the Land Use Regulation Context

Also available as part of the eCourse

[Dark Sky Cities; Fair Housing Issues; plus Sovereign and Governmental Immunity Challenges](#)

First appeared as part of the conference materials for the 19<sup>th</sup> Annual The Land Use Conference session

"Sovereign and Governmental Immunity in the Land Use Regulation Context"