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## Chapter Nine Personal Liability of Councilmembers

The liability of city governments for torts has been an accepted 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 the Tort Claims Act, city governments may be liable for limited damages resulting from the actions of councilmembers and other city officials. But what about 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

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 the “lowest and most responsible” bids on 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.

State and federal courts generally hold that councilmembers are 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. However, liability is still a possibility; thus, mayors and councilmembers should be aware of their potential liability problems and have a basic understanding of the legal principles involved.

### Liability Under State Law

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. That being said, cases do indicate that councilmembers and mayors should ensure that any action taken is pursuant to the proper authority and in good faith. If a councilmember or mayor takes an action that was not authorized by the law, ordinances, or policies of the state or city, he or she could be liable for the results.

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.

While councilmembers are often protected from personal liability based on civil lawsuits for their actions, councilmembers should still be careful to follow all applicable state laws. Councilmembers can be held liable for criminal penalties or restitution if they violate any state criminal or other statute when fulfilling their duties.

### Liability Under Federal Law

City officials can be sued individually for violations of individuals’ rights under federal law, usually through claims alleging violations of constitutional rights or in the

employment law context. The law customarily used to take action against city officials for violations of constitutional or federal law is Section 1983, Title 42, of the United States Code. It states:

*Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... 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.*

Several types of policy decisions affecting city employees or citizens could render councilmembers liable under Section 1983, depending on the specific facts of the situation. However, city officials are usually protected by qualified immunity in these suits. Qualified immunity is a defense that is used when an individual is sued under federal law. To be covered by qualified immunity, the official has to show that the action taken: (1) was discretionary; (2) was within his authority to take; and (3) did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.

Councilmembers can also be held personally liable for some federal laws involving leave or wages. Qualified immunity would protect these councilmembers so long as the criteria listed above are met.

It is rare that a city official is held personally liable under federal law for the decisions he or she makes. City officials should just ensure that they have a reasonable basis for any decision that is made, and that applicable state and federal law is reviewed before decisions are made, especially those decisions that affect specific individuals.