SELECTED ISSUES IN LAND USE LITIGATION

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PRIMARY AREAS OF PRACTICE

Representing cities and other local governmental units in litigation involving civil rights, land use regulation, property taxation, economic development, employment, and governmental tort liability. Assistant City Attorney, City of Houston 1978 - 1991, (Section Chief, Corporate Section 1984 - 1987, Section Chief, Litigation Section 1987 -1991). Olson & Olson, L.L.P. (December 1991 - present).

PROFESSIONAL INFORMATION

Licensed to practice in all Texas state courts; Supreme Court of the United States; United States Court of Federal Claims; United States Courts of Appeals for the Fifth Circuit and Sixth Circuit; United States District Courts for the Southern, Northern and Eastern Districts of Texas

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Texas State Bar Association; Litigation Section
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Texas City Attorneys' Association
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SELECTED PROFESSIONAL ACTIVITIES

- "Removal and Remand: Taking the Initiative", oral presentation and paper, Texas Municipal League, 14th Annual Workshop for Attorneys, August 13, 2004, Austin, Texas.

- "Removal and Remand, the Defendant's Choice of Forum", oral presentation and paper, Texas Bar CLE, Suing and Defending Governmental Entities, July 22, 2004, Galveston, Texas.

- "Substandard Housing: Cleaning Up Our Communities to Keep Property Values High", oral presentation, Clear Lake Area Council of Cities, October 25, 2000, Shoreacres, Texas.

- "Liability and Immunity for Public Officials in Land Use Cases", oral presentation and paper, Southwest Legal Foundation, Municipal Legal Studies Center, Short Course on Planning and Zoning for Public Officials and Attorneys, June 23, 2000, Dallas, Texas.

- "Individual Liability Issues for City Officials Involved in Land Use Decisions", Oral presentation and paper, Texas Municipal League, Land Use Seminar, January 14, 2000, Austin, Texas.

- "Public Employer Whistleblowers", oral presentation, Texas Municipal League, Employment Law Conference, October 27, 1999, Webster, Texas.

- "The Privacy Rights of Municipal Officers and Employees", oral presentation and paper, International Municipal Lawyers' Association, Annual Conference, September 28, 1999, Toronto, Ontario.

- "The Zoning Board of Adjustment", oral presentation and paper, Texas Municipal League, Land Use Conference, April 9, 1999, Houston, Texas.

- "Determining the Privacy Rights of a Governmental Employee", oral presentation and paper, Texas Municipal League, 8th Annual Workshop for Attorneys, August 7, 1998, Austin, Texas.

- "Recent Developments in the Regulation of Manufactured Homes", oral presentation and paper, Texas City Attorneys Association, Semi-Annual Conference, June 18, 1998, South Padre Island, Texas.

- "Ethical issues for the Insurance Defense Lawyer", oral presentation and paper, Texas Municipal League, Sixth Annual Workshop for Attorneys, August 9, 1996, Austin, Texas.

- "Damage Claims Arising From Criminal Conduct of Third Parties", oral presentation and paper, Texas City Attorneys Association, Semi-Annual Conference, October 27, 1994, Austin, Texas.

- "Recent Federal Cases Affecting Cities", oral presentation and paper, Texas City Attorneys Association, Semi-Annual Conference, October 1990, Corpus Christi, Texas.

- "Legal Issues in Public Works Contracts", oral presentation and paper, Texas City Attorneys Association, Semi-Annual Conference, June 1987, Corpus Christi, Texas.

- Vice-Chairman, City of Houston Civil Service Commission, 1995-1997.

- Participant - NITA Trial Advocacy Program, Houston, Spring 1979.

EDUCATION

University of Texas, J.D., with Honors, 1978

University of Houston, B.A., Political Science, 1975

SELECTED ISSUES IN LAND USE LITIGATION

I.

Introduction

Building officials, city councils, planning and zoning commissions, boards of adjustment, county commissioners' courts and other local government agencies and officials are empowered to make important decisions concerning the adoption and enforcement of regulations governing private land use. These agencies and officials regularly make decisions that have major financial impacts on property owners, real estate developers, and other participants in the real estate market. A local government's decision to adopt a new zoning ordinance, to grant or deny a requested zoning district change, to approve or disapprove a subdivision plat, to grant or deny a building or occupancy permit, or to impose an impact fee or easement dedication requirement can have a dramatic effect on the use and value of real property. It is not surprising that property owners, developers, and other interested parties sometimes seek to challenge these decisions in the courts.

Conflicts between the government's power to regulate land use and private property rights have given rise to much litigation in recent years. Both state and federal courts have frequent occasion to consider private challenges to local government land use regulation. In Texas a variety of local governmental entities have authority to impose land use regulations. Municipalities have the broadest authority over land use regulation, including the power to adopt zoning regulations[1], subdivision regulations[2], and development plat regulations[3]. Other entities, including counties, municipal management districts, tax increment reinvestment zones[4], and other special districts have more limited

authority. Challenges to these regulations run the gamut from simple questions of statutory interpretation to complex and novel questions of constitutional law. The complexities of land use litigation are many, and it is easy to become lost in the wilderness. There are however, certain fundamental principles of law that underlie all land use disputes; a basic understanding of those principles does much to bring order to the otherwise chaotic state of affairs.

The most basic principle is the concept of the government's police power. As will be discussed in more detail below, the police power is the government's authority to regulate private conduct for the benefit of society as a whole.[5] Every land use dispute involves, to some degree, the question of whether a particular government action constitutes an authorized exercise of the police power. An understanding of the police power and its limitations provides a framework for analyzing almost any dispute over land use regulations.

A related and equally important issue is the standard of review employed by courts in reviewing various types of regulatory actions of local governmental entities and officials. The selection of the appropriate standard of review often determines the result in a judicial challenge to land use regulations.

A final issue that arises in many land use disputes is the question of individual liability for local government officials involved in the regulatory process. The courts, recognizing the valuable role that individual officials play in the local regulatory process, have developed special legal doctrines protecting public officials from liability in most circumstances.

This paper is intended as a general discussion of selected legal principles and issues that commonly arise in judicial challenges to land use regulation. It is not intended as legal advice applicable to a particular situation. Finally, the author has spent his entire career representing the interests of cities, other local governmental entities, and local public officials and makes no apology for any bias he may have in their favor.

II.

The Police Power

A. Generally

Government at all levels is endowed with the power to regulate private conduct, including the use of privately owned land, for the benefit of society as a whole. This aspect of government is known as the "police power" and has been described as follows:

> "t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity …. Police power is the exercise of the sovereign right of a government to promote order, safety, morals and general welfare within constitutional limits and is an essential attribute of government."[6]

The United States Supreme Court explained the philosophical underpinnings of the police power in 1876, in a case involving a challenge to an Illinois statute that regulated the amount that could be charged for grain storage.

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, [citations omitted]; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government …. From this source come the police powers, which …. 'are nothing more or less than the powers of government

> inherent in every sovereignty, that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."[7]

The Texas courts have recognized the importance of a broad police power encompassing the right to regulate private property, even where the regulation may result in an economic loss to the property owner.

> "Generally speaking, municipal corporations have the right, under the police power, to safeguard the health, comfort, and general welfare of their citizens by such reasonable regulations as are necessary for that purpose….All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in a loss to individuals…". (Quoting, with approval, from 30 TEXAS JURISPRUDENCE, p. 120, § 58.).[8]

B. Advancing the Public Good

A fundamental requirement for a valid exercise of the police power is that the action taken be reasonably calculated to advance a legitimate public goal.[9]

> "The police power authorizes only such measures as are reasonable; to be valid as an exercise of this power, an ordinance must be reasonable in its operation upon the persons whom it affects, and must not be unduly oppressive – that is, it must appear that the means are reasonably necessary and appropriate for accomplishment of a legitimate object falling within the domain of the police power". (Quoting from TEXAS JURISPRUDENCE.).[10]

The concept of what is an appropriate goal of a police power regulation is a broad one.[11] The Texas Supreme Court has described it variously as one that advances: "the health, safety, or general welfare of the people"[12]; "public health, safety, morals, or general welfare"[13]; or "the public health, safety, morals, convenience, and general welfare of the inhabitants of a city"[14]

C. Limitations on the exercise of the Police Power

Though broad, the police power is not without limitation. The most basic limitation, discussed above, is the requirement that any regulation of private interests under the police power be arguably calculated to advance the public good. Another limitation is that an exercise of the police power may not impair a right guaranteed under the state or federal constitutions. Especially for local governmental entities, a particular exercise of the police power must be within the authority granted to the entity by the state and may not be inconsistent with state or federal statutes.

> "The [police] power is not an arbitrary one; it [has] its limitations. Thus it is subject to the limitations imposed by the Constitution upon every power of government, and will not be permitted to invade or impair the fundamental liberties of the citizens…. [P]roperty rights can not be made subservient to the arbitrary will of a municipality or its officers or agents, nor can the right of a person to use his property in a lawful manner be made to depend upon the unrestrained predilection of other property owners, whose property rights are not unlawfully invaded." [15]

1. Authority to Enact Particular Regulations

Municipalities and other units of local government are created by the state and derive their authority to act from the state constitution or specific acts of the state legislature.

> "Municipalities are creatures of our law and are created as political subdivisions of the state as a convenient agency for the exercise of such powers as are conferred upon them by the state. They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them. All acts done by them must find authority in the law of their creation." (*internal citations omitted*)[16]

Home rule municipalities have been granted the broadest regulatory authority.[17]

> "Home rule cities have "full power of self-government" and "look to the acts of the legislature not for grants of power ... but only for limitations on their powers." The intention of the legislature to impose such limitations must appear with "unmistakable clarity;" and if the limitations arise by implication, the provisions

> of the law must be "clear and compelling to that end." (*internal citations omitted*).[18]

Type-A general law cities also have broad regulatory authority over land use.[19] Other local governmental entities have much narrower authority.[20]

2. Statutory Limitations on Authority

The authority of a local governmental entity to exercise a particular type of regulatory authority may be limited by a governmental unit's own organic law or by state statute. For instance, some cities have city charter provisions requiring a referendum election to approve the adoption of an initial zoning ordinance.[21] The general authority to regulate land use may also be limited by specific state statutes. Two examples are Chapter 245 of the Texas Local Government Code and Chapter 2007 of the Texas Government Code.

Chapter 245 contains a prohibition on applying new or amended local regulations to a project that was initiated prior to the adoption or amendment of the regulations. The chapter is generally applicable to land use regulations. However, it contains some important exceptions including: certain municipal zoning regulations[22] and certain land use regulations enacted by cities that do not have zoning[23].

Chapter 2007 requires governmental entities to publish advance notice and conduct "takings assessments" before undertaking certain land use regulatory activities. The chapter's provisions are not applicable to municipal land use regulations except where the regulations: 1) apply in the city's area of extraterritorial jurisdiction; and 2) are not uniform throughout that area.[24]

A local regulation that conflicts or is inconsistent with a state statute is invalid.[25] However, the mere fact that a state statute regulates a subject area does not, in and of

itself, invalidate a local regulation on the same subject.[26] As long as the local regulation is not inconsistent with the state statute, it can stand.[27]

> "[T]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted. When there is no conflict between a state law and a city ordinance, the ordinance is not void."[28]

3. Constitutional Limitations

The principal constitutional limitation on the police power is the requirement that a government regulation be reasonably related to the accomplishment of a proper public purpose.[29] This requirement is necessary to meet the constitutional guarantees of substantive due process and equal protection.[30]

All private property is held subject to government regulation under a valid exercise of the police power.[31] The government is not required to make compensation for economic loss caused by the proper and reasonable exercise of the police power.[32] However, a "regulatory taking" can occur if a land use regulation goes too far in restricting the use of property.[33] There is no "bright line" test for determining when a regulatory taking has occurred.[34]

III.

Standards for Judicial Review of Land Use Decisions

A. Generally

A threshold legal issue in every challenge to the validity or application of a land regulation is the question of what standard of review the court will employ in reviewing the actions of the local government. In many cases this decision will be the single most important factor in determining the result. The standard of review applicable to a particular land use action or decision varies depending on the character of the action in

question. Actions that are deemed to be legislative or quasi-judicial are afforded the most deferential standard of review, and those that are determined to be executive or administrative are afforded the least deferential standard of review.

In some instances state or local laws provide specific authority for judicial review of local land use decisions and prescribe the standard of review. For example, the Texas Zoning Enabling Act[35] and many local zoning ordinances[36] provide a right to appeal to the court from a municipal zoning board of adjustment's decision to grant or deny a variance or special exception from a zoning regulation, or to sustain or overturn a decision by a building official. In other instances, litigants bring statutory or constitutional challenges to land use decisions using established common law or statutory remedies. Such challenges include those brought under state and federal constitutional provisions.

As we learned in high school civics class, our state and federal governments are organized around three co-equal branches of government – the executive, the legislative, and the judicial – and each branch is given exclusive authority over the matters committed to it. The Texas Constitution specifically addresses the separation of powers:

> "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."[37]

A plaintiff's challenge to the validity or application of a local land use regulation necessarily asks the judicial branch of government to exercise supervision or control over matters committed to the legislative or executive branches. Texas courts honor the

separation of powers by employing standing and ripeness doctrines to limit their review of legislative and executive matters. They also utilize standards of review that grant deference to the other branches. Similarly, the federal courts apply a deferential standard when reviewing local zoning decisions.[38]

Examples of legislative actions in the arena of land use regulation include: the adoption or amendment of a zoning ordinance, the adoption or amendment of subdivision regulations, and the approval of a specific use permit under a zoning ordinance. Examples of quasi-judicial actions include zoning board of adjustment decisions on requests for variances and special exceptions.

B. Legislative Actions

A challenge to the validity of a land use regulation, as opposed to a challenge to the application of the regulation to particular circumstances, places the courts in conflict with the legislative branch. Accordingly, the courts do not review such a matter de novo.[39] Instead, they indulge the presumption that a legislative act is reasonable and valid and impose upon the party challenging its validity the "extraordinary burden" to demonstrate its invalidity.[40] This deferential review is not limited just to acts of the state legislature, but applies as well to acts of city councils and other local governmental bodies.[41] The cases of *Brookside Village v. Comeau*[42], *City of College Station v. Turtle Rock*[43], and *Shelton v. College Station*[44] provide illustrations of the application of the deferential standard of review in a challenge to the validity of local land use regulations.

1. ***Brookside Village v. Comeau***. This case is an example of one in which the selection of the appropriate standard of review is determinative of the result. The City of Brookside Village, a general law city, adopted a series of ordinances regulating

the placement of mobile homes and prohibiting mobile homes from being placed outside of mobile home parks. The Comeau family owned a four-acre tract in the City and wanted to put a mobile home on the property. When the City denied their placement request, they filed suit alleging, among other things, that the City's mobile home ordinances were invalid because they "impose an arbitrary restriction on property use, not related to the preservation of the general health, safety, morals, or welfare of the community".[45]

The trial court found the City's ordinances valid, and the Comeau family appealed. The court of appeals reversed, holding that the ordinances were an "unfair restriction on the use of property which served no legitimate state interest".[46] In its opinion the court of appeals placed the burden of justifying the ordinance on the City stating, "[a]ppellee City has not shown that a threat to the public health is present if appellants have a mobile home outside of a mobile home park."[47]

The Texas Supreme Court began its opinion with a discussion of the appropriate standard of review starting with the premise that "[j]udicial review of a municipality's regulatory action is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions."[48] The Texas Supreme Court went on to describe the plaintiff's burden in challenging a local governmental entity's legislative act as "an extraordinary burden' to show 'that no conclusive or even controversial or issuable fact or condition existed" as to whether the legislation in question was valid.[49]

> "We are directed to consider all circumstances and determine, as a substantive matter, if reasonable minds may differ as to whether a particular zoning regulation has a substantial relationship to the protection of the general health, safety or welfare of the public. If the evidence before this Court reveals an issuable fact in this respect, the restriction must stand as valid."[50]

Applying this highly deferential standard to the Brookside Village ordinances, the Supreme Court came to the opposite conclusion from the court of appeals and upheld the validity of the ordinances.

> "We hold that such regulation of mobile homes represents a valid exercise of a municipality's police power. The ordinances here in question bear a substantial relationship to the public health, safety, morals or general welfare. They are not clearly arbitrary and unreasonable, and hence are not unconstitutional."[51]

2. ***City of College Station v Turtle Rock*.** This is another example of a case in which the selection of the appropriate standard of review determined the result. The City of College Station adopted an ordinance requiring the dedication of park land, or the contribution of cash in lieu of dedication, as a condition of subdivision plat approval. A local real estate developer filed suit challenging the validity of the ordinance. The trial court granted summary judgment for the developer, and the court of appeals affirmed, holding that the ordinance constituted a taking of private property without compensation in violation of the Texas Constitution.[52] In its opinion, the court of appeals disagreed with the City's contention that parks are beneficial to the community and that requiring park land dedication promotes a public purpose.[53] "We note that parks are not necessarily beneficial to a community or neighborhood."[54]

On appeal, the Texas Supreme Court rejected the court of appeals' attempt to second-guess the City's legislative determination that parks are beneficial to the City and its neighborhoods. The Texas Supreme Court explained that the test for a challenged regulation is 1) whether it was "substantially related' to the health, safety, or general welfare of the people"; and 2) whether it was reasonable rather than arbitrary.[55] In determining whether a particular regulation is substantially related to health, safety, and public welfare, the court does not substitute its judgment for that of the legislative body.

Instead, the court must uphold the regulation if "reasonable minds may differ" as to whether the regulation will accomplish a legitimate goal.[56] Applying this deferential standard of review to the College Station ordinance, the Texas Supreme Court upheld the validity of the ordinance.

3. ***Shelton v. College Station*.** In this case, the U.S. Court of Appeals for the Fifth Circuit considered a substantive due process challenge to a local zoning board of adjustment's decision to deny certain variance requests.[57] The plaintiffs were the owners of a building in the Northgate area of College Station. The City had adopted stringent off-street parking requirements in the Northgate area to combat traffic problems. The plaintiffs had purchased a building that had been used as a photography studio with plans to convert it to a pool hall and tavern. Under the City's ordinance the plaintiffs were required to add a substantial amount of additional off-street parking as a condition for changing the use of their building. They unsuccessfully applied to the board of adjustment for a variance from that requirement on at least three different occasions.

Rather than appealing the denials to state court, as permitted by the City's ordinance, they filed a suit for damages in federal court arguing that their right to substantive due process had been violated. The trial court ruled for the City, but a three-judge panel of the court of appeals reversed finding that there was a material issue of fact as to whether the denials were "arbitrary and capricious".

On motion for rehearing en banc, the court of appeals rejected the rationale of the earlier panel decision. Specifically, the court rejected the contention that the facts underlying a local zoning decision were to be determined based on an evidentiary record. Instead the court concluded that a local zoning decision is to be reviewed by a federal

court using the legislative model.[58] Under that model a zoning decision must be upheld if there is any conceivable rational basis to support it.[59] The rationale basis need not be established by proof of actual facts but can be justified by hypothetical facts.[60]

C. Quasi Judicial Actions

Certain actions by local governing bodies in the interpretation and administration of land use regulations are classified as quasi-judicial in character. The best example is the decision of a municipal zoning board of adjustment to grant or deny a variance to a provision of a zoning ordinance.[61] The courts employ an abuse of discretion review to any factual findings a board might make in denying or granting a variance application.[62]

> "As a quasi-judicial body, the decisions of a zoning board are subject to appeal before a state district court upon application for a writ of certiorari. The district court sits only as a court of review, and the only question before it is the legality of the zoning board's order. To establish that an order is illegal, the party attacking the order must present a "very clear showing of abuse of discretion." A zoning board abuses its discretion if it acts without reference to any guiding rules and principles or clearly fails to analyze or apply the law correctly. With respect to a zoning board's factual findings, a reviewing court may not substitute its own judgment for that of the board. Instead, a party challenging those findings must establish that the board could only have reasonably reached one decision. Our abuse-of-discretion review is necessarily less deferential when considering any legal conclusions made by the zoning board and is similar in nature to a de novo review." (Internal citations omitted)[63]

D. Administrative Actions

The courts are not permitted to usurp the authority of the executive branch by supervising or directing the method of enforcing a local regulation.[64]

> "The statutes under consideration being valid, Sec. 28 of Article 1 of our State Constitution, Vernon's Ann. St., which prescribes that, "No power of suspending laws in this State shall be exercised except by the Legislature", denies to the judicial branch of our government any power to suspend, supervise or direct the manner and method of its enforcement."[65]

However, judicial review of administrative actions is generally less deferential than for legislative actions. The courts use the same rules of construction for local regulations as they do for state statutes.[66] Although a court is not bound by an administrative construction of a local regulation by the agency charged with its enforcement, that construction is afforded some weight if it is reasonable and does not conflict with the plain meaning of the regulation.[67]

IV.

Claims against Individual Public Officials

When government officials make decisions that affect the lives and property of others in significant ways, they incur the risk of being made a party to lawsuits challenging the legality of those decisions.

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."[68]

Real estate developers or others who believe they have been treated unfairly are not always satisfied with bringing a suit against the governmental entity. Often, they sue the individual decision makers as well.[69] The possibility of being sued by a developer who claims to have suffered millions of dollars in damages because a development request was turned down is a frightening thought to the public official who has the responsibility of reviewing that development request. It hardly seems fair that public officials, many of whom volunteer their time to serve in unpaid, part-time positions on public boards or commissions, should have to consider such matters.

Practically speaking, there is little "real risk" of personal liability for land use decisions made by public officials. Where public officials carry out their duties in good faith and within the limits of their authority, little concern should be given to the risk of personal liability. The courts, recognizing the importance of public service to the proper functioning of government, have developed legal doctrines that, in most cases, protect public officials from personal liability.

A. Personal Liability

Government officials who are found personally liable for damages are responsible for paying the damages out of their personal funds and, if they do not pay, their personal assets are subject to execution to pay the judgment.[70]

> "Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability"[71]

However, the mere fact that public officials are named as defendants in a lawsuit does not alone indicate that the plaintiff is seeking to recover damages from the officials in their individual capacities.[72]

Public officials are often named as defendants "in their official capacity" only. The courts treat such suits as a suit against the governmental entity for which the officials serve.[73] "Official capacity" suits do not seek to impose liability against individual government officials but instead seek to impose liability on the governmental entity. In an "official capacity" suit, if a judgment for damages is awarded, the city and not the individual officials is responsible for paying the damages.[74]

Public officials are also named as defendants in cases where the plaintiff seeks only injunctive or declaratory relief and does not seek an award of damages. An example of such a case is where a plaintiff seeks to enjoin the enforcement of a land use regulation

because of its alleged invalidity under the state or federal constitution. In such suits, it is common practice to name the building official or zoning administrator as defendants where they are the officials charged with the responsibility of enforcing the challenged regulation.

In an "official capacity" lawsuit, the relief sought by the plaintiff is directed not at the individual who holds the public office but at the office itself.[75] If during the pendency of the suit the occupant of the office resigns, the new occupant of the office will automatically be substituted as the defendant.[76] In contrast, in a "personal capacity" lawsuit, if the defendant officials were to leave office during the pendency of the suit they would remain defendants and their successors in office would not take their places as named defendants in the lawsuit.

It is not always easy to determine whether a claim is being asserted against governmental officials in their official or individual capacities. In some circumstances the plaintiff's pleadings will specifically identify the capacity in which the official is sued. In other circumstances, the capacity in which an official is being sued must be determined from the course of the lawsuit proceedings.[77] A plaintiff may make claims against both a governmental entity and one or more of its public officials in the same suit, seeking to hold both the entity and the official liable in money damages.

Where a plaintiff seeks to sue public officials in their individual capacities, the plaintiff must arrange for delivery or "service" of the suit papers to the individual public officials. In contrast, service on the employing city is sufficient for a suit against officials only in their official capacities.

B. Immunities and Defenses

Government officials who are sued for damages in their individual or personal capacities have strong defenses available to them that will, in the overwhelming majority of cases, defeat any claims against them. The primary defenses are the defenses of absolute and qualified immunity.

> "Special problems arise… when government officials are exposed to liability for damages…. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it. Such considerations have led to the creation of various forms of immunity from suit for certain government officials."[78]

1. Absolute Immunity

The strongest defense available to public officials is the defense of absolute immunity. Generally, federal and state courts have applied absolute immunity where the actions about which the plaintiff complains were found to be legislative[79], judicial[80], or quasi-judicial[81] in nature. The determination of whether a specific action is legislative, judicial, or quasi-judicial is made, on a case-by-case basis, by analyzing the character of the action taken, not by mere reference to the title or character of the body or official taking the action.[82] For example, all actions of a judge are not necessarily judicial in character, and all actions of a city council are not necessarily legislative in character. A judge's action in terminating a probation officer has been held to be an administrative act and not a judicial one.[83] Similarly, a city council's action in denying a development plan for a planned development district has been held to be an administrative action.[84]

Generally, land use decisions made by municipal bodies will be characterized by the courts as legislative or quasi-judicial, and the members of those bodies who participate in the decision-making process will be entitled to absolute immunity. City council actions in adopting and amending land use regulations will generally be characterized as legislative. Similarly the actions of boards of adjustment in granting or denying variances or considering appeals from the decisions of the zoning administrator are generally classified as quasi-judicial or legislative in character. However, some actions taken by city councils or other bodies involved in the land use regulatory process may be characterized as administrative.[85]

Most of the land use regulatory decisions made by building officials and zoning administrators will be characterized as administrative in nature. However, the availability of review of those decisions by a board of adjustment or other body, reduces the likelihood that such decisions will form the basis for a damages claim against such officials.

2. Qualified Immunity

Both the federal courts and the Texas state courts recognize a defense of qualified immunity to claims that arise out of the administrative or executive functions of government officials. Under federal law the defense is generally referred to as "Qualified Immunity" or "Good Faith Immunity". Under state law it is often referred to as "Official Immunity". Generally, the defense provides immunity from personal liability to public officials for actions they take within the scope of their authority and in good faith. In both state and federal court, a defendant who asserts the defense in pre-trial proceedings at the trial court level and has it rejected, may file an immediate appeal. Qualified

immunity is inferior to absolute immunity because it requires defendants to establish their good faith before the defense applies.

V.

CONCLUSION

Land use litigation is a complicated area of the law. As with all complicated matters, it is always helpful to start with an understanding of basic issues. The concepts of governmental police power, judicial standards of review, and individual liability are among the most important issues that arise in land use litigation.

END NOTES

[1] TEX. LOC. GOVT. CODE CH. 211 (Vernon Supp. 2006)

[2] TEX. LOC. GOVT. CODE CH. 212, subch. A (Vernon Supp. 2006)

[3] *Id*., subch. B (Vernon Supp. 2006)

[4] The board of directors of a TIRZ has the authority to adopt zoning ordinances applicable within its boundaries, if authorized by the municipality that created the zone. TEX. TAX CODE § 311.010 (c)

[5] *Lombardo v. City of Dallas*, 124 Tex. 1, 9-10, 73 S.W.2d 475, 478 - 479 (Tex. 1934)

[6] Black's Law Dictionary, 5th edition at p. 1041

[7] *Munn v. People of State of Illinois*, 94 U.S. 113, 124-125 (U.S. 1876)

[8] *Lombardo v. City of Dallas*, 124 Tex. 1, 9-10, 73 S.W.2d 475,478 - 479 (Tex. 1934)

[9] *Id.*

[10] *Id.*

[11] *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[12] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[13] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 795 (Tex. 1982)

[14] *Lombardo v. City of Dallas*, 124 Tex. 1, 11, 73 S.W.2d 475, 479 (Tex. 1934)

[15] *Id.* at 478 - 479

[16] *Payne v. Massey*, 145 Tex. 237, 240-241, 196 S.W.2d 493, 495 (1946)

[17] The Home Rule Amendment to the Texas Constitution, Article XI, Section 5, grants home rule cities the full power of local self government. *City of Houston v. State ex rel. City of West University Place*, 142 Tex. 190, 192, 176 S.W.2d 928, 929 (1944)

[18] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 807 (Tex. 1984)

[19] For example, TEX. LOC. GOVT. CODE § 51.012 authorizes Type A cities to adopt any ordinance "that is necessary for the government, interest, welfare, or good order of the municipality as a body politic."

[20] For example, Texas counties have only the authority expressly granted by the constitution or a state statute. *Lewis v. Cameron County*, 24 S.W.3d 617, 618 (Tex.App.—Corpus Christi 2000, rehearing denied)

[21] TEX. LOC. GOVT. CODE § 211.015 (Vernon 1999); *Rossano v. Townsend*, 9 S.W.3d 357, 363 (Tex. App.—Houston [14 Dist.] 1999)

[22] TEX. LOC. GOVT. CODE § 245.004 (2)

[23] *Id.* § 245.004 (3)

[24] TEX. GOVT. CODE § 2007.003 (b) (1)

[25] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982)

[26] *Id*.

[27] *Id*.

[28] *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17, 19 (Tex. 1990)

[29] *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939 (1979)

[30] *Shelton v. College Station*, 780 F.2d 475 (5th Cir. 1986)

[31] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[32] *Id.*

[33] See generally, *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005)

[34] *Id*. at 804

[35] TEX. LOC. GOVT. CODE CH. 211 (Vernon Supp. 2006)

[36] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[37] *Vernon's Ann*.TEX. CONST. art. 2, § 1

[38] *Shelton v. College Station*, 780 F.2d 475 (5th Cir. 1986)

[39] *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998)

[40] *Id.*

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[41] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[42] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 793 -794 (Tex. 1982)

[43] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 805 (Tex. 1984)

[44] *Shelton v. College Station*, 780 F.2d 475 (5th Cir. 1986)

[45] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982)

[46] *Id*.

[47] *Comeau v. City of Brookside Village*, 616 S.W.2d 333, 334 (Tex.Civ.App., 1981, writ denied)

[48] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982)

[49] *Id*.

[50] *Id.* at p. 793

[51] *Id.* at pp. 793 -794

[52] *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 803 (Tex. 1984)

[53] *Id*. at 804-805.

[54] *Id*.

[55] *Id*. at 805.

[56] *Id*.

[57] *Id*.

[58] *Shelton v. College Station*, 780 F.2d 475, 481 (5th Cir. 1986)

[59] *Id*. at 482

[60] *Id*.

[61] *City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex. 2006)

[62] *Id*.

[63] *Id*.

[64] *Rayburn v. Richardson*, 131 S.W.2d 1000, 1001 (Tex.Civ.App. 1939, writ denied)

[65] *Id*.

[66] See generally, *Board of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002).

[67] *SWZ, Inc. v. Board of Adjustment of City of Fort Worth*, 985 S.W.2d 268, 270 (Tex. App. – Fort Worth 1999, review denied); TEX GOVT. CODE § 311.023

[68] *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882)

[69] See, for example, *Howeth Investments, Inc. v. White*, __ S.W.3d __, 2007 WL 529924, 2 (Tex. App. – Houston [1st Dist.] 2007)

[70] *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)

[71] *Forrester v. White*, 484 U.S. 219, 223 (1988)

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Forrester v.White*, 484 U.S. 219, 223 (1988)

[79]*Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed2d 79 (1998); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.— Dallas 1989, writ denied)

[80] *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Bradt v. West*, 892 S.W.2d 56 (Tex. App. – Houston [1st Dist] 1994, writ denied)

[81] *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 592, 139 L.Ed.2d 471 (1997); *Village of Bayou Vista v. Glaskox*, 899 S.W.2d 826 (Tex. App. – Houston [14th Dist] 1995, no writ)

[82] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Bradt v. West*, 892 S.W.2d 56 (Tex. App. – Houston [1st Dist] 1994)

[83] *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)

[84] *Bartlett v. Cinemark*, 908 S.W. 2d 229 (Tex.Civ.App.—Dallas 1995, no writ)

[85] *Id*.