

Item #7 – Legal Report – Legislative Update

Monique and I have stayed in close communications with legislative staff in both Rep. Kacal's and Sen. Schwertner's offices in order to keep our proposed enabling act bill on track. Last week we were asked to provide a letter indicating the Board's desire to amend the enabling act. The letter and approved minutes were provided. Following this summary page is a copy of the letter.

In addition, Kacal's staff asked Monique to answer several legal questions they had about the bill. Detailed answers were provided. Kacal's office indicated they were satisfied with the answers and would now move forward to file the bill. A copy of the email containing both the questions posed and Monique's responses follows this summary.



BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT

P.O. Box 528 · HEARNE, TX 77859 · (979)279-9350 · FAX: (979)279-0035
WWW.BRAZOSVALLEYGCD.ORG

March 5, 2015

The Honorable Kyle Kacal
Texas State Representative, District 12
P.O. Box 2910
Austin, TX 78768

Dear Representative Kacal,

The Brazos Valley Groundwater Conservation District greatly appreciates you and your office working with the District to make a minor amendment to the District's enabling act. When the District's legislation was originally passed, and has now been codified in Chapter 8835 of the Texas Special District Local Laws Code, the Enabling Act specifically stated that the directors are not to be compensated. The general idea behind this was the District was subject to a confirmation election by its citizens, and they did not want the citizens' user fees (this is a user fee, not a property tax, funded district) to be used for director service. The unintended consequence of the inability to be compensated for their service is the director's lack of coverage under the Texas Tort Claims Act. By amending the District's enabling act allowing payment of the modest sum of \$10/day, with a maximum of \$150/year for each director, the directors are allowed access to the same legal defenses under the Texas Tort Claims Act provided to all other State and local government public officials and employees.

Please find attached the official approved meeting minutes, evidencing the Brazos Valley Groundwater Conservation District Board of Directors unanimous approval of the proposed legislation. You will find this listed under Item #6.

Please let us know if you have any questions. Thank you so much for your support and service.

Sincerely,

Alan M. Day
General Manager

Alan Day

From: Monique Norman <norman.law@earthlink.net>
Sent: Tuesday, March 03, 2015 12:32 PM
To: 'Ryan Skrobarczyk'
Subject: RE: Brazos Valley GCD draft amendment

Ryan,

We are happy to answer any questions or concerns. It appears that there are major misconceptions of what the Texas Tort Claims Act is and who may claim a defense of qualified immunity under the Texas Tort Claims Act and why. I have put together a few points below that explain what the TTCA is, who it covers, and what is qualified immunity. Coverage under the TTCA does NOT give the special treatment or blanket immunity from lawsuits. It only allows a potential defense for individuals to be dismissed from frivolous tort claims if the good faith test is met—a defense that covers almost every public servant in Texas, from the Governor to city policemen.

If you would like to talk to an unbiased authority for background information that does not work for a groundwater district or an entity suing a groundwater district, as in Lost Pines GCD, please contact the Texas Attorney General's office. The AG often defends elected officials and employees that are covered by the Texas Tort Claims Act and is well versed with the qualified immunity defense that may be asserted to tort claims.

- (1) Prior to the Texas Tort Claims Act ("TTCA"), which was adopted in 1969, individuals could not recover damages from state or local governmental units for tortuous injuries resulting from the actions of a government employee or officer in the performance of a governmental function. So prior to the TTCA there was absolute government immunity and the TTCA changed that.

The TTCA is a set of statutes that determine when a governmental entity and its public servants may be liable for tortuous conduct under state law. It also provides limits to damages that can be recovered from the governmental entity.

It protects governmental time and resources from diminishment from private litigation and encourages forthright action by public officials. It also protects the government from fraudulent or frivolous suits that otherwise may arise because of the perceived "deep pockets" of government entities.

- (2) **The TTCA ONLY applies to torts.** The TTCA only applies to lawsuits for negligence, libel, slander, assault, battery, fraud, negligent misrepresentation, false imprisonment, tortuous interference with a contract and any other state tort. It does NOT apply to any other non-tortuous actions. Therefore, it has no bearing whatsoever on a groundwater district's actions on a permit and ensuing litigation. It does NOT cover takings lawsuits or contracts, or any other non-tort litigation.
- (3) **99.99% of Texas public office holders and employees are covered by the TTCA.** Everyone from the governor, attorney general, senators, state representatives, their staffs, state agency commissioners and employees, to county judges, sheriff deputies, city council, policeman, city sanitation workers, etc. are all covered under the TTCA as "employees."

The term "employee" in the TTCA is a legal term to define the group that is covered by the TTCA. The Texas Tort Claims Act clearly defines an "employee" in Sec. 101.001(2) as "any person, including an officer or agent, who is in the paid service of the governmental unit..."

It is intended to cover any public servant that is paid by the State of Texas or a Texas local government, and not used to define the employer/employee relationship—other than to say that work for a Texas government.

- (4) The TTCA offers a qualified immunity defense to Texas public servants that are sued for a tort claim. They may be dismissed from the tort claim in a lawsuit under the qualified immunity defense, only if they meet the following test:**

The public servant was:

- (1) acting within the course and scope of their job duties;*
- (2) involved in a discretionary decision; and*
- (3) acted in good faith.*

The TTCA does NOT give public servants absolute or blanket immunity from tort lawsuits, but it allows the individuals to be dismissed from a lawsuit under the qualified immunity defense, if they can meet the above test. If they are acting in bad faith, they will not be dismissed from the lawsuit.

This is very important for public servants, as they often get named in lawsuits (frivolous or not), when they had no involvement in the alleged tort. It would be difficult to find public servants to run for office, if they had to be fearful of being named individually and defending frivolous lawsuits.

So for example, if a policeman legally arrests someone, and that person then sued the policeman, the City, the mayor, and the city councilmen for assault—under the Tort Claims Act, the mayor and city councilmen may be dismissed from the lawsuit because they could meet the above test and prove their qualified immunity defense under the TTCA. The City may still be sued, but the mayor and city councilmen may be dismissed from personal liability.

If someone slipped and fell at the Capitol and they sued the Governor, senators, etc. for negligence—under the TTCA they could get qualified immunity if they met the above test and be dismissed from the lawsuit. The State may be sued, but the Governor and senators may be dismissed from personal liability under the qualified immunity defense.

Also, please see below my responses to your questions.

Thanks so much,
Monique

Monique Norman
Attorney at Law
P.O. Box 50245
Austin, Texas 78763

512.459.9428
Fax 512.459.8671
norman.law@earthlink.net

-----Original Message-----

From: Ryan Skrobarczyk [mailto:Ryan.Skrobarczyk@house.state.tx.us]

Sent: Monday, March 02, 2015 6:16 PM

To: norman.law@earthlink.net

Subject: Re: Brazos Valley GCD draft amendment

Monique,

Thank you for that response. I was confused by some of what Ross was saying so thank you for checking in on that. I have included below some comments that came up when I was running traps on the idea. Please keep in mind that this is in response to the article, not our draft, so the comments may not match up with what our draft for the BVGCD seeks to accomplish but I would appreciate some feedback. This may be indicative of the opposition if there is in fact any to the idea.

My quick and dirty reaction to such a bill is that it won't work to insulate or give them blanket immunity for several reasons, including the following: **Coverage by the TTCA is NOT intended to insulate or give them blanket immunity and it does not operate to do so. It merely gives them the same potential defense to a frivolous tort claim that every other Texas public servant has—from the Governor, to legislative staffers, to city firemen. No special treatment is requested—they are just requesting not to be singled out and would like to be treated the same as all other public officials and State/local government employees.**

1. A state immunity statute would not insulate a board member from individual liability from the claims we've filed against the LPGCD Board for violations of 1983 and 1988 (42 USCA) because the federal statute would preempt a "competing" state law; and
Correct, this has nothing to do with any lawsuit but tort claims and does not give immunity for takings claims.
2. Being an "employee" carries no blanket immunity from liability, e.g., there are lots of cases about governmental "employees" such as police chief, prison warden, school superintendent, under current law being individually liable.

Correct, being an "employee" does not give blanket immunity, just the ability to assert the qualified immunity defense under the Texas Tort Claims Act, only. So to be dismissed from a lawsuit, a public servant has to prove the defense that: they were acting within the course and scope of the their job duties; they were involved in a discretionary decision; and they were acting in good faith. The governmental entity may still be sued, but the public servants may be dismissed under qualified immunity if they meet the good faith test.

Any public servant can be successfully sued, as is documented by a lot of case law, if they were acting in bad faith or outside their scope of duties.

I also think that there would be some issues with such legislation related to "conflict of interest" between being the governmental official and the employee of the same governmental body, particularly when it would be in the same function and carrying out the same duties in the purported dual roles. You can't have the board be an employee in the same capacity they were elected to, or appointed to. Being an employee carries a different set of rules that those of elected/appointed officials. Moreover, it create a conflict between the fiduciary duty to the people as a board member and the duties to the district as an employee. Finally, the legislature in Chapter 36 makes the board responsible for the management of the district, employees just carry out their duties as employees.

The TTCA does not have anything to do with conflict of interest. The term "employee" is used by the TTCA to define the group that it covers. In this sense, it can be interchanged with public servant. It is not used in the

TTCA to define the employer/employee relationship—it is just used generally, as in all public servant are employees of the State because they are being paid by public funds.

If a district employee or director acted in bad faith, they would not get qualified immunity---conflicts of interest laws have nothing to do with the qualified immunity defense (other than I suppose it could be evidence to determine bad faith and then the “employee” would not be successful in their qualified immunity defense).

For example, if a district employee gets in a car wreck in a district truck while on the job and sues the district and all of its directors individually for negligence—the directors may be able to be dismissed from the lawsuit if they can prove the qualified immunity 3-part test. The District may remain in the lawsuit under TTCA, but not the individual directors that had nothing to do with the car wreck.

Questions to ask:

1. If the board member unlawfully “takes” a person’s property, or violates their rights through the Board’s decisions, since they are “employees,” wouldn’t an appropriate remedy for violating the law, the constitution, etc. be to “terminate the employee”?

The TTCA and a qualified immunity defense to torts has absolutely nothing to do with takings claims.

2. If you “terminate” the Board member as an “employee,” don’t they lose their position on the Board?

The TTCA does not define “employee” in the employer/employee relationship---but just to clarify that Texas public servants are covered by the TTCA and have a potential defense to frivolous tort claims—only. The governor, senators, state reps are all included as employees and allowed to assert the same qualified immunity defense in a frivolous lawsuit.

a. If they are elected, you can’t simply “fire” them.

No, elected officials can’t be simply fired, but that does not involve the TTCA or the proposed legislation.

b. Other issues arise too.

3. How do you “elect” employees under the Constitution?

Employees under the TTCA just means you are paid by the State or Texas local government. The TTCA covers almost all state and locally elected officials, as they are “employees” because they are paid by the State.

4. Should we make the Governor and members of the Legislature “employees” of the state so that they can’t be personally liable?

Yes, the Governor and members of the Legislature and their staffs are all “employees” under the TTCA and can all assert the defense of qualified immunity in a torts claim. They will only be dismissed from the tort claim in the lawsuit if they can prove the qualified immunity good faith test.

5. If you abuse your office, and you violate the law or the constitution, why shouldn’t there be accountability and personal liability?

There is absolutely personal liability for all of the State’s “employees.” If an elected official or public employee is sued for a tort and they acted in bad faith or outside the scope of their official duty—they will not be successful in the qualified immunity defense and will remain a defendant in the lawsuit.

The TTCA ONLY applies to tort claims, not constitutional or any other violations. Personal liability for bad acts, tort or otherwise, has been affirmed by many many court cases.

a. Immunity from suit makes Board members “bullet proof” and you lose all “checks and balances” to make Board Members accountable to their constituents and prevents them from carry our personal and illegal agendas. Such a provision would eliminate all accountability of the districts and their Board members. Accountability, or the lack thereof, is already the biggest problem we have GCDs.

The TTCA does not give absolute or blanket immunity to lawsuits and does not make any public servant bullet proof. That is actually why the TTCA was adopted—because prior to the TTCA, the State and local governments did have absolute immunity in tort claims and the TTCA changed that. However, the TTCA rightfully acknowledges that many frivolous lawsuits are filed against public servants, and there should be a way for public servants to have a qualified immunity defense and be dismissed from a lawsuit if the three-part good faith test is met.

b. There is an excellent quote in one of the 1983 cases we found in our research, which says something to the effect that will personal liability may seem harsh, the remedy simple – just follow the law!

Yes, personal liability is important to maintain checks and balances in society. However, the TTCA acknowledges that we are a very litigious society with many frivolous lawsuits filed. People should not be fearful of becoming public servants because fear of personal liability in frivolous lawsuits. The TTCA gives public servants some comfort in that if and when they are sued individually for something they had nothing to do with---they have available the defense of qualified immunity if they acted in good faith in administering their official duties.

A couple of other seeds to sow for thought, in the meantime, is if they are “employees” does that impact the Voting Rights issues that are always circling governmental entities and proper ethnic representation, etc.

The TTCA and its qualified immunity defense have absolutely nothing to do with the Voting Rights Act---it ONLY applies to tort claims.

Finally, in those districts where directors are appointed, would they also be “employed” by the appointing agency, i.e., the County Judge. As employee, would they be more accountable to the County Judge or Commissioner’s Court, even in their role as a Board Member thereby enhancing/aggravating the already huge conflict of interest inherent in the relationship.

No, appointed directors are not employees of the appointing authority (usually commissioners courts). The term “employee” in the TTCA only means that they are in the class of public servants that are covered by the TTCA---it has nothing to do with employer/employee relationships or conflicts of interests.

I’m working on a more thoughtful response, but look forward to others thoughts in the meantime.

Thanks,

Ryan

Sent from my iPhone