

August 2004 Legal Q&A
Bennett Sandlin
Legal Services Director

Q: What are the potential disadvantages when a city extends its elected terms of office to longer than two years?

A: Article 11, Section 11 of the Texas Constitution allows a city to extend its elected terms of office from two years to up to four years. General law cities may extend their terms by an election of a majority of the qualified voters. Home rule cities may have longer than two year terms either through charter adoption or charter amendment. Adopting longer than two year terms, however, creates three potential problems due to the provisions of Article 11, Section 11. First, all vacancies must be filled by special election when terms of office are longer than two years. Thus, the council loses any ability it may have had to appoint replacements whenever there is a vacancy on council. Second, all council elections must be won by majority vote in cities with longer than two years terms. This means at-large voting is no longer an option, and also means that runoff elections become a possibility. Finally, terms of longer than two years trigger the possibility that a councilmember automatically resigns his seat by announcing his candidacy for another elected office, provided there is more than one year remaining on his term. TEX. CONST. art. 11, § 11.

Q: What is official immunity?

A: Official immunity protects certain city officials and employees from lawsuit liability. An official or employee may be entitled to individual immunity as a matter of common law for acts that are: 1) discretionary or quasi-judicial in character; 2) done in good faith; and 3) within the scope of their authority. Perry v. Texas A&I Univ., 737 S.W.2d 106 (Tex.App. – Corpus Christi 1987, writ ref'd n.r.e.). Such officials or employees may be immune from liability even if the city itself is liable under the Tort Claims Act.

There is no official immunity, however, for ministerial actions or actions that are mandatory. Worsham v. Votgsberger, 129 S.W. 157 (Civ.App. 1919, no writ). The line between discretionary and ministerial actions is a fine one, and city officials should consult with local legal counsel whenever liability is an issue.

Q: If an automobile is damaged by a pothole on a city street, is the city liable?

A: Generally, no. The Tort Claims Act only waives a city's immunity regarding the condition of real property, such as streets, in cases that involve personal injury or death. Assuming no one was injured or killed because of the pothole, damage to a car alone will generally not be recoverable. Cities should always consult with local counsel and their liability carrier about specific claims.

Q: Is a city ever liable for damage to tangible property, such as cars?

A: Yes, when the damage was caused by a city employee during the operation or use of a motor driven vehicle or motor driven equipment, and if the employee would be personally liable under Texas law. For example, if a city employee is driving a car on city business and causes an automobile accident, the city can be liable.

Q: What happens if a community wishes to incorporate as a city within the extraterritorial jurisdiction (ETJ) of an existing city.

A: A community may only incorporate in the ETJ of an existing city with the consent of the existing city. If the city denies consent, however, the community seeking to incorporate may then present the city with a petition for annexation signed by a majority of the qualified voters of the area and the owners of at least 50 percent of the land. Such a petition forces the city to make a decision. Either the city must agree to annex the area pursuant to the petition, or else the community is permitted to incorporate six months after the petition is submitted. According to statute, failure to annex after receipt of the petition means the city has legally consented to the incorporation. TEX. LOC. GOV'T CODE ANN. § 42.041 (Vernon 1999).

Q: May a city ban the consumption of alcohol in public places within the city?

A: Cities are normally preempted by state law from regulating the sale or consumption of alcohol. Among a handful of exceptions to this general rule is Section 109.035 of the Alcoholic Beverages Code. That section authorizes a city to ban the consumption of alcohol or the possession of an open container of alcohol in a public place within a "central business district." Among other criteria, the land in such a district must be zoned at least 90 percent commercial. A city must petition the Texas Alcoholic Beverage Commission to designate a central business district. The prohibition in the district does not extend to private buildings or residences. TEX. ALCO. BEV. CODE ANN. § 109.35 (Vernon 1995).

Q: If city employees form a union, may the city negotiate issues such as pay with that union?

A: Usually not. Section 617.002 of the Texas Government Code prohibits the state and cities from recognizing labor organizations as the official bargaining agent of its members. TEX. GOV'T CODE ANN. § 617.002 (Vernon 1994). Any contracts entered into through negotiations with such a union would be void. An exception to this general prohibition is contained in Chapter 174 of the Local Government Code, which allows collective bargaining with police and fire unions following an election of the voters. Certain other cities have specific legislation allowing for collective bargaining as well.