
TOOLS for the *New City Councilor*

Boosting Your Legal Immunities

By Kim Kunkle

How many lawyers does it take to sue your town for an incorrectly installed light bulb? Well that depends on the situation. The answer could be zero, if certain legal immunities apply.

Discretionary Immunity

Items on your city's "To Do" list often outnumber the dollars in the budget to get them done. As elected officials and other administrators necessarily exercise judgment and prioritize spending, pressing items get immediate attention. Meanwhile, less hazardous-seeming projects are placed further down on the list.

But what if damages result from doing nothing?

Road repair funds are limited. Your council decides to install a guard rail on "Deadman's Curve," deferring pothole maintenance, for the time being. Sadly, a citizen is seriously injured when his bicycle tire snags in a pothole.

Is the city liable for damages? Can elected officials be sued for bad judgement in failing to order pot-hole repairs? What about non-elected employees in charge of road maintenance? Are they liable for failing to provide citizens with smooth, rut-free roads?

You Can't be Sued for Voting the Wrong Way

Courts recognize that there may not be money to pay for all projects at once. The important thing is to deliberate, enlist testimony and/or expert opinion, exercise judgment and document the decision-making process. Doing nothing can get your city sued. But *deciding* to do nothing as a matter of public policy due to budget limits and more-pressing priorities, evokes the protection of *discretionary immunity*. Just be sure to keep clear records of the following:

- The decision-making process, showing a clear choice between competing alternatives; and
- The decision being made at the proper policy-setting level, usually the council or commission level, except in cases where authority to set policy has clearly been delegated to a lower administrative level.

Workers' Compensation Immunity

If a worker injures another party on the job, the worker's employer may be liable to pay damages. For example, a gardener is trimming a lawn. A delivery truck goes over the

curb, striking and injuring the gardener. The banged-up gardener might understandably expect compensation from the delivery company whose employee caused the injury.

Take the exact same scenario, except this time, the delivery truck driver is a government employee. The gardener cannot recover damages from the governmental agency/employer for the injuries due to *workers' compensation immunity*. The injured gardener, in this case, can only collect workers' compensation from his or her own employer.

The governmental agency/employer would likely be liable for damages to the injured gardener if he or she were off work at the time of the accident. The immunity applies only to workers on the job at the time of the injury.

Recreational Immunity

Oregon law grants *recreational immunity* to landowners who permit free public use of their lands for recreational purposes, such as hunting, fishing, horseback riding, bicycling, snowmobiling, and the like. This same protection extends to governmental agencies overseeing public lands open free to the public for recreational use, including skate parks, trails, bicycle paths, boat docks and other recreational venues.

An important key to recreational immunity is the "no charge" part. Assessing a fee for use can subject the landowner or governing body to legal liability. Similarly, the land must specifically be designated open for recreational use in order to qualify for recreational immunity.

Punch line

So as to how many lawyers it takes to sue your city? Keep that number to a minimum by following steps to ensure immunity where the law allows.

For more information: *City County Insurance Services recommends that cities contact their city attorney with any questions about legal immunities and other risk-management strategies.* ■

Editor's Note: Kim Kunkle is the communications coordinator for City County Insurance Services.