

Chapter Five

Town Powers

§ 5-1. Source of Town Powers

For local governments, the term “powers” describes the authority to undertake certain activities such as building a road, imposing a tax, or adopting an ordinance. Understanding where a town’s powers come from is an important step in learning how to properly exercise those powers.

The first point to keep in mind is that towns have no inherent powers. Merely existing as a local government does not, in and of itself, automatically grant the entity any powers. Local governments are the creations of the Legislature and have only those powers delegated by the Legislature. It is important to remember that all local governments are equal creations of the Legislature. Townships are **NOT** lower levels of government than counties, cities, or school districts. Towns are general purpose local government created to serve the needs of those living in townships.

It could also be said that some powers are court created. However, these powers are more of an enhancement or explanation of the powers granted from the Legislature than a direct grant of authority. It is not the role of courts to legislate, but the interpretations courts give to legislative actions can play a significant role in determining the scope of a power. In some cases, courts have swept away a power the Legislature expressly granted to a local government because the power was unconstitutional or conflicted with other grants of authority.

Refer to Document **TP1000** for additional information on the meshing of state and local regulations.

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§ 5-2. Types of Powers

The powers granted to towns by the Legislature are called **expressed powers**. They are expressed powers because the Legislature has expressly set them out in law. There is also a related category of powers called implied powers. **Implied powers** are those that are not stated in the law, but are necessary to carry out an expressed power. Courts recognize implied powers as a required part of expressed powers because it would be impossible for the Legislature to identify and set out in detail every activity a local government would need to undertake to carry out a power.

The breadth of implied powers in relation to an expressed power depends upon the issue addressed by the expressed power. The Minnesota Supreme Court has described implied powers as follows:

If the activity is one peculiarly subject to local regulation - based upon the nature of the activity and its customary area of performance - the necessary implied powers in aid of carrying out express statutory power is construed liberally. However, if a matter presents a statewide problem, the implied necessary powers of a municipality to regulate are narrowly construed unless the Legislature has expressly provided otherwise.

Welsh v. City of Orono, 355 N.W.2d 117, 120 (Minn. 1984) (citation omitted).

Expressed powers may be broad or specific in nature. Sometimes the Legislature has granted

a very specific power and has set forth how it is to be exercised. In other cases, the Legislature has granted local governments a great deal of discretion in the exercise of the authority. The Legislature has recognized that in some areas it would be impossible to contemplate every possible scenario and try to provide for it in statute. One of the best examples of a broad grant of authority is the general police powers. These are the powers local governments rely on to adopt ordinances to protect the health, safety, and welfare of residents and the public. Minn. Stat. §§ 365.10, subd. 17; 368.01, subd. 19 (urban towns).

Power may be **discretionary or mandatory**. A discretionary power is one the local government chooses to exercise. A mandatory power is one the local government must exercise. An example of a discretionary power is the ability for towns to establish an ambulance service. Minn. Stat. § 471.476. The requirement to establish a cartway to landlocked property when properly petitioned is an example of a mandatory power. Minn. Stat. § 164.08. If a local government fails to perform a mandatory power, the town may be sued by an affected resident seeking a writ of mandamus asking the court to compel the local government to act.

Refer to Document **TP2000** for information on the comparison of urban and non-urban (rural) town powers. Refer to Document **TP3000** for additional information on the joint powers act.

§ 5-3. Description of Town Powers

Towns have a wide variety of powers. Minn. Stat. § 365.02 provides that towns are “public corporations” that may sue, own and dispose of property and contract. Additional town powers include the ability to:

- erect buildings;
- establish and maintain roads;
- exercise the power of eminent domain;
- provide for police and fire protection;
- impose certain fees and charges;
- provide recreational facilities and programs;
- specially assess benefited owners for improvement projects;
- install and maintain water, wastewater, and storm water systems;
- provide for ambulance services;
- enact land use and general police power ordinances;

- provide for and maintain parks and cemeteries; and
- provide for the collection of solid waste.

This is obviously not a complete list, but it demonstrates the wide range of powers towns can utilize as needed to provide the services requested by town residents.

A town may exercise a power jointly with another government entity that has the same power. Minn. Stat. § 471.59. The ability to develop and act under joint powers agreements is a very valuable tool for governments to cooperate in the delivery of services.

There are several powers and duties applicable to town boards that exceed the scope of this section. The following chart contains a list of documents available about specific town powers and activities found in MAT’s Information Library. www.mntownships.org.

Document	Topic
TD 2000	Town Board Licensing Authority
TD 3000	Liquor Licenses
TD 4000	Weed Inspection Duties
TD 5000	Fence Viewing Duties
ES 1000	Fees for Emergency Services
PZ 1000	Planning & Zoning Authority
PZ 2000	Zoning Decisions
PZ 3000	Complying with the 60-Day Rule
TP 6000	Town Ordinances
TP 8000	Town Road Ordinances
F 1000	Contributions & Donations

§ 5-4. To Whom Powers are Granted

One unique feature of town government is the degree to which the residents are involved in the decision-making process. Whether consent of the voters (electors) is required depends on the words in the statutes granting authority. A statute may grant a power to: (1) the board exclusively; (2) the electors exclusively; or (3) a combination of the board and electors.

1. **Powers Exclusive to the Board.** Board powers are those powers that may be exercised directly by the board without having to obtain elector authorization. For example, the following language gives the board the discretion to decide whether to give money to a cemetery:

“The governing body of any . . . town may, in its discretion, appropriate a sum not to exceed \$10,000 per annum to any public or privately owned cemetery located within or without its boundaries if the cemetery is used for the burial of the dead of any . . . town without restriction.”

Minn. Stat. § 471.84. In towns that have adopted urban town powers, the voters allow more power to be exercised exclusively by the board.

2. **Powers Exclusive to Voters.** There are few powers held exclusively by the electors, but they include one of the most significant powers – the authority to set the tax levy. The town board prepares and presents a budget to the electors, including recommended levy amounts, but the electors decide on the actual amount of the levy. This ability to set the levy has enormous impact on the town, even in areas where the board has exclusive decision-making authority.
3. **Powers Shared by Board & Voters.** Many powers are shared between the voters and the board, requiring the support of the town board and a majority of town electors voting on the issue before the power is exercised. Most of these powers are found in Minn. Stat. § 365.10. The section declares that the electors of a town, at their annual town meeting, may do what is in this section. Some of the items listed fall exclusively to the electors to decide, but most allow the electors to authorize the board to carry out the power. Once a power is authorized by the electors, the board decides whether it will exercise the power. The board cannot force the voters to

authorize a power, and the voters cannot force the board to exercise a power.

Town officers should be aware that some actions involve the exercise of multiple powers. Some of the powers the board may exercise on its own, but other powers necessary to carry out the activity may require elector authorization. For example, under

Minn. Stat. § 471.15 a board has authority to acquire recreational facilities, but if it must bond or otherwise incur debt to make the acquisition, a vote of the electors is likely required. A careful mapping of the powers needed to carry out a project will help identify if and to what extent elector authorization is needed.

§ 5-5. Delegating Powers

When the Legislature delegates a power to a local government to be exercised in the discretion of the local government, the local government may not delegate the power to someone else without legislative authority. See *State ex rel. City of St. Paul v. St. Paul City Ry. Co.*, 81 N.W. 200, 201 (Minn. 1899). Because town powers are often shared between the board and the electors, boards sometimes forget that the electors cannot decide an issue if the statute granted the power exclusively to the board.

It is common for a board to seek input from the electors at the annual town meeting or at a hearing, but the board must ultimately make the decision when the Legislature has indicated it is the board's decision to make. The restriction against delegating governmental powers to others also applies to delegations to town officers or town committees. Having officers or committees gather information is proper, but absent specific statutory authority, the board cannot give the power to them to exercise as they see fit. The information and any associated recommendations must be reported back to the full board for consideration and a decision.

§ 5-6. Exceeding Powers

Serious consequences are imposed on officers who knowingly exceed the powers of office or exercise powers without the proper authority. To avoid those consequences, town officers must:

1. Take the oath of office before exercising any power.
2. Exercise powers as a group and not as individuals. For example, no one supervisor may bind the town to a contract without a vote of the board. The power to contract is given to the board as a group. It is possible for the board to delegate some limited authority to a supervisor, but the delegation must first be approved and limited by the board as a group.
3. Follow the procedures required to exercise a power. Failing to follow the needed procedure to exercise a power is tantamount to acting without authority. The procedural requirements attached to the grant of a power protect the rights of those involved in the process and safeguard the public interests.

Knowingly exercising a power the board does not have or knowingly exceeding a power is a crime and will likely be treated harshly. Any knowing abuse of power is punishable as a gross misdemeanor. Insurance policies that towns and their officers would normally rely upon to provide a defense to lawsuits do not cover criminal acts. Officers found guilty of a crime will not have their defense costs or any fines reimbursed by the town or its insurance companies.

When officers or boards act without or beyond their authority, it is called an *ultra vires* act. Courts strictly apply the *ultra vires* doctrine against local governments to protect the public. An act found to be *ultra vires* is without legal force or effect.

§ 5-7. Enacting Ordinances

Creating local legislation regulating the lives of citizens and having the authority to prosecute those who violate those regulations creates a public trust that must be taken very seriously. Some towns are very active in the exercise of their regulatory powers, while others have no ordinances at all. Despite these differences, authority to enact ordinances is based on and controlled by law. As such, it is important to understand how the law regarding town ordinance authority operates.

Refer to Document **TP6000** for additional information on town ordinances.

A. Authority to Enact Ordinances

It may be difficult to identify the statute authorizing the adoption of an ordinance. Once the statutory authority is identified, it may be difficult to decide under which authority the ordinance should be adopted. For example, an ordinance regulating dog houses could be considered either a zoning ordinance or a general police power ordinance. The two types require different procedures to enact and enforce the ordinance, so it matters which type of ordinance it is enacted as.

A statute may clearly refer to local ordinance regulation of an issue, but not provide the authorization to enact the ordinance. In those cases, the board must find authorization for the action in a different statute. If there is any doubt whether statutes referring to local regulations authorize the adoption of such ordinances, the board should take the conservative approach and follow a procedure that combines the strictest of the procedures required to enact a general police power ordinance and a zoning ordinance.

Part of enacting an ordinance is the authority to attach penalties for violating it. A town board “may declare that a violation of an ordinance is a penal offense and prescribe penalties for violations, except as otherwise provided by law. No penalty shall exceed that provided by law for a misdemeanor, but the costs of prosecution may be added.” Minn. Stat.

§ 366.01, subd. 10. “Misdemeanor” means a crime for which a sentence of not more than 90 days or a fine of not more than \$1,000, or both, may be imposed.” Minn. Stat. § 609.02, subd. 3. Towns are also authorized to enforce and provide penalties for violating zoning ordinances. Minn. Stat. § 462.362.

B. Properly Drafting Ordinances

Identifying the authority to enact an ordinance is only the first step. The more challenging step is to make sure the authority is properly exercised. There are legal limits and requirements on the exercise and drafting of ordinances. Just as the Legislature grants local governments the authority to enact ordinances, it can also limit or prohibit the exercise of the authority in certain fields (i.e., issues). The closing of certain fields to local regulation is called preemption. For example, one statute states, “the provisions of this chapter preempt ordinances by local governments that prohibit or regulate any matter relating to the registration, labeling, distribution, sale, handling, use, application, or disposal of pesticides.” Minn. Stat. § 18B.02. The statute completely removes the town’s authority to regulate the issue.

Even if a town is not expressly preempted from regulating a field, a town is still prohibited from enacting regulations that directly conflict with state law. For example, towns can enact shoreland regulations, but those regulations may not establish requirements that are less strict than those established by statute for such areas. If a local regulation would permit what the statute expressly prohibits, a direct conflict with state law would exist.

For zoning ordinances, the Legislature has determined that town ordinances must be consistent with and at least as restrictive as the county zoning ordinances, if any. Minn. Stat. § 394.33, subd. 1. Because of this limitation, whenever the town or county proposes an ordinance or amendment, the town must be sure it remains in compliance with this strictness requirement.

Drafting ordinances presents its own set of unique challenges. Ordinances may not be written too broadly, be too vague, be discriminatory, or violate a host of other limitations. Unfortunately, it is sometimes difficult to determine at the time of drafting whether one of these lines is being crossed. That is why it is important for all towns to have their town attorney draft their ordinances or at least review them before they are adopted. Even then, there are no guarantees of success if an ordinance is challenged.

Refer to Document **TP6100** for information on drafting ordinances and Document **TP6100A** for a model ordinance format.

C. Ordinances Formalities

The procedure to adopt an ordinance is controlled first by the statute granting the power on which it is based, and then by the general ordinance formality requirements. Some statutes require the town board to receive elector authorization before enacting an ordinance. Before a town can adopt a zoning ordinance, it must provide notice and hold a hearing. Minn. Stat. § 462.357.

Besides the requirements contained in the authorizing statute, there is a standard list of ordinance formalities in Minn. Stat. § 365.125 towns must follow when adopting ordinances (the same ordinance formalities exist for urban towns under Minn. Stat. § 368.01, subd. 21).

Under the statute, an ordinance must be:

1. enacted by a majority vote of all the members unless a larger number is required by law;
2. signed by the chair and attested to by the clerk;
3. have a title and must begin with certain words;
4. published in whole or in approved summary form in a certain font size;
5. posted at the community library;
6. recorded in a town ordinance book within 20 days of publication with proof of publication.

In addition any ordinance must be filed at the county law library. Minn. Stat. § 415.021.

Town zoning ordinances must be filed with the county recorder's office. Minn. Stat. § 394.33, subd. 1.

The required majority vote of the supervisors to enact an ordinance usually comes in the form of a motion to adopt the ordinance. It is important to create a record establishing the basis for why the ordinance is being adopted. Sometimes the ordinance itself contains the reasoning. If not, the town board should create a record of the findings and reasoning supporting the adoption of the ordinance to help avoid challenges for having exercised its power arbitrarily and capriciously. The reasoning could be recorded in the minutes from the discussion leading up to the adoption or set out in a resolution adopting the ordinance.

D. Administering and Enforcing Ordinances

In many ways, an ordinance is only as good as its administration and enforcement. Little good, and perhaps much harm, can result from the enactment of an ordinance that is not administered and enforced. Regulations have at their core the protection of health, safety, and welfare. Persons counting on those protections may be left more vulnerable with the enactment of a local ordinance that is not enforced than they would have been if no local ordinance existed at all.

The need for establishing procedures for the timely administration of ordinances was emphasized when the Legislature adopted the 60-day rule. Under the rule, a properly completed and filed written request related to zoning or septic systems must be approved or denied within 60 days or it is automatically deemed approved. Minn. Stat. § 15.99, subd. 2 (a limited opportunity to extend the 60-day period is provided). Completing all the necessary hearings and reviews within 60 days is no easy task and demands the efficient administration of such requests. Administration and enforcement of ordinances should not be left only to the clerk, but should be shared among town officers. Refer to Document **PZ3000** for additional information on the 60-day rule.

Enforcing ordinances is a challenge for towns. Without its own police officers, towns are usually dependent on the sheriff's department to enforce traffic and parking ordinances. Other types of ordinances such as those regulating land uses do not require police officers, but they do require the town to establish a uniform enforcement process. Enforcement is often based on complaints that bring a compliance issue to the town's attention since most towns do not have the staff or resources to actively engage in regular compliance reviews. If an owner does not comply with notices issued by a town to come into compliance, the costs to seek enforcement through the courts can be significant.

E. Amending & Repealing Ordinances

Amending or repealing an ordinance is accomplished by following the same procedures required to adopt the original ordinance. In other words, ordinances are amended or repealed by ordinance. In some cases, the authorizing statute will indicate the procedure to amend an ordinance. *See* Minn. Stat. § 462.357, subd. 3. But statutes rarely describe a method to repeal an ordinance. Despite the lack of direction, the town board can repeal an ordinance by passing a new ordinance that indicates the prior ordinance is repealed. Sometimes an amendment to an ordinance is made by adopting the 'amended' ordinance in its entirety with a provision that repeals the earlier ordinance.

§ 5-8. Responding to Emergencies (Emergency Powers)

The following information discusses only a small piece of the programs and procedures established by the state and federal authorities to assist local governments to respond to emergencies. Town boards must continue to work closely with their county emergency management officer as well as personnel from the state and federal emergency management offices. An important part of assisting this process is keeping accurate records as to expenses related to the emergency. Exercise of emergency powers depend upon the existence of a true emergency that threatens public health or safety. The emergency exceptions to the statutory procedures may not be used merely to help meet deadlines, shorten a statutory process for the convenience of the board, or to save money.

A. Emergency Meetings and Inspections

Town boards can conduct emergency meetings under the open meeting law to respond to circumstances that, in the judgment of the town board, require immediate consideration to protect public safety. Minn. Stat. § 13D.04, subd. 3. The only notice required for these meetings is to news media if they have filed a written request for notice of such

meetings. If such a request has been filed, then the town is required to make a good faith effort to call the person identified in the notice before the meeting.

Minutes of emergency meetings should be kept to the extent they can under the circumstances. At some point the minutes must be formally prepared and the board must state the circumstances that led it to declare an emergency.

The standard on-site inspection exemption given to towns may also be of assistance. Under Minn. Stat. § 366.01, subd. 11, a board may conduct an on-site inspection if it does not have staff that could otherwise perform the inspection. For the inspection, the board need not comply with the open meeting law and is not required to provide notice except to news mediums in the same manner as with emergency meetings. Keep in mind that this exemption only covers the board when it is acting in a staff capacity, only performing the activities and decisions a staff member would be authorized to make if the town had staff. Any decisions that go beyond the staff capacity must be made at a board meeting (e.g., emergency board meeting).

B. Emergency Contracting

During emergencies, when the situation requires immediate action that is essential to the health, safety, or welfare of the town, a town board is authorized to let contracts without providing notice or using competitive bidding. Minn. Stat. § 365.37, subd. 4. Remember, notice and competitive bidding is only required for contracts over \$100,000. Minn. Stat. § 471.345, subd. 3. For the rental of equipment, sealed bids are not required unless the cost exceeds \$60,000. Minn. Stat. § 471.345, subd. 5a.

Even broader authority to respond to emergencies is provided to towns under Minn. Stat. § 12.37. During an emergency or disaster, a town board may:

1. enter contracts and incur obligations necessary to combat the disaster by protecting the health and safety of persons and property and by providing emergency assistance to the victims of the disaster; and
2. exercise the powers vested by this subdivision in the light of the exigencies of the disaster without compliance with time-consuming procedures and formalities prescribed by law pertaining to:
 - a. the performance of public work;
 - b. entering contracts;
 - c. incurring of obligations;
 - d. employment of temporary workers;
 - e. rental of equipment;
 - f. purchase of supplies and materials;
 - g. limitations upon tax levies; and
 - h. the appropriation and expenditure of public funds, for example, but not limited to, publication of ordinances and resolutions, publication of calls for bids, provisions of civil service laws and rules, provisions relating to low bids, and requirements for budgets.” Minn. Stat. § 12.37

An emergency procedure is also provided for the exception under Minn. Stat. § 471.88, subd. 5, allowing a supervisor to contract with the town when competitive bids are not required by law. Normally, before a town may contract with a supervisor under the exception, the board must pass a resolution authorizing the

contract that sets forth specific information. Minn. Stat. § 471.89. However, in an emergency that makes the prior adoption of a resolution impracticable, the resolution may be adopted after the work is performed. Minn. Stat. § 471.89, subd. 2. In such cases, the resolution must state the facts of the emergency.

Other emergency provisions that apply to towns include:

- Towns have the authority to contract debts and pledge the public credit to obtain services to help prevent or respond to a forest fire. Minn. Stat. §§ 88.42 & 88.43.
- The Metropolitan Council is authorized to contract with towns to coordinate emergency services within the metropolitan area. Minn. Stat. § 473.243.
- Towns in the metropolitan area engaged in the management of surface waters in a watershed pursuant to Minn. Stat. §§ 103B.211-.255 have the authority to declare an emergency. Minn. Stat. § 103B.522.
- Towns are authorized to participate in planning for emergency flood protection measures. Minn. Stat. § 103F.155.

C. Emergency Levy and Indebtedness

Town boards are authorized to levy a tax after the annual meeting, but before October 1 in the same year, and then pledge the credit of the town by issuing town orders up to the amount of the levy to pay for emergency work done or materials used on the roads within the town. Minn. Stat. § 164.04, subd. 3.

A town is also authorized to issue certificates of indebtedness if it finds that its funds in a fiscal year are not sufficient to meet the expenses incurred or anticipated because of any natural disaster or other public emergency requiring the making of extraordinary expenditures. Minn. Stat. § 475.754. The certificates must mature within three years, may be issued with or without advertising for bids, bear interest at a rate not to exceed that prescribed by chapter 475, be in the form prescribed by the state auditor and commissioner of commerce, and contain such terms and conditions as the board determines.