The following is an excerpt from the 2012 Manual on Town Government.

**LIABILITY**

Any discussion of a town’s exposure to a lawsuit must start with an understanding that under Minnesota Statute § 365.02, a town can sue and be sued. In addition, towns and town officers can face criminal charges.

**Civil Actions**

There are two basic categories of civil actions; actions at law, which seek money damages, and actions in equity, which seek non-monetary relief.

In order to bring a civil action against a town, a person must have “standing.” Standing requires the person bringing the suit to have some connection to the controversy. A person must usually have suffered some actual injury, or be able to point to a statute that specifically gives them standing.

Taxpayer suits are an exception to this general rule. In these, a person attempts to force the board to take or stop a particular action. For example, based on their status as a taxpayer, a person could bring a suit to stop an unlawful disbursement of public funds or stop the execution of an unlawful contract.

How an action may be brought against a town will depend upon the perceived harm and the remedy being sought. If personal injury or property damage is being alleged, the complaint against the town will likely be a tort claim. Tort claims are brought with the intention of compensating someone for injuries resulting from the negligence or other unreasonable conduct of others. Tort claims include trespass, assault, and a number of other possible claims. As discussed in chapter 11 of this manual, however, the legislature has given towns and other local governments immunities from certain tort claims and capped the damages that may be awarded for others.

In order to prove negligence, a plaintiff must show: (1) a duty; (2) that the duty was breached; (3) that the breach was the proximate cause of plaintiff’s injury; and (4) that plaintiff was in fact injured. Johnson v. State, 553 N.W.2d 40, 49 (Minn. 1996) (citations omitted). Negligence cases often result in strenuous arguments over whether a duty existed and whether it was breached. For example, a person injured by a town snow plow may claim that the plow operator had a duty to stop at a stop sign. The issue would become whether there actually was a duty to stop and if so, whether the operator failed to do so.

Towns may also be sued for breach of contract. Suits based on a contract are not torts even if damages are sought. Considering the large number of contracts towns enter into in a year, combined with the often informal nature of those contracts, this is a constant potential source of suit.
Employment claims are also a potential risk. Suits against the town can come directly from the employee for a variety of reasons ranging from harassment to injuries resulting from failure to follow proper employee safety requirements.

Other challenges to town actions may allege that a board failed to follow proper statutory procedures before it acted, or did not have sufficient justification for a decision. If the claimant prevails, a court may order the town to reconsider its decision or reverse the decision outright.

Occasionally, a “writ” is brought against a town. There are a variety of writs provided in law, including writs of error, certiorari, mandamus, prohibition, and quo warranto. Minn. Stat. § 480.04. One of the writs most commonly brought against local governments is the writ of mandamus. A writ of mandamus asks a court to order the town to perform a non-discretionary duty the town has failed to perform. An example of when a mandamus action has been brought against a town is for failing to establish a cartway when it was required to do so by law.

**Criminal Actions**

Individual board members may be subject to criminal prosecution for violations of some laws. Holding public office makes town officers subject to criminal statutes written specifically to guard against potential abuse of the power and trust that goes with the office. Minn. Stat. §§ 609.415-.465. A criminal investigation into the actions of an officer may be initiated in a number of ways. These include a criminal complaint, the county attorney’s own initiative, or a referral from the state auditor’s office.

Any officer who knowingly exceeds the powers of the office, fails to perform a known mandatory ministerial duty of office, or knowingly makes a false report may be prosecuted for a gross misdemeanor. Minn. Stat. § 609.43. A gross misdemeanor carries a penalty of up to a $3,000 fine, up to one year in jail, or both. If an officer after leaving public office exercises the powers of the office or fails to turn over the records and property of the office to the successor, he or she may be prosecuted for a gross misdemeanor. Minn. Stat. § 609.44.

Town officers need to be aware of the criminal penalties associated with contracting. When sealed bids are required under the municipal contracting law, for instance, failure to follow the procedure could result in the officers being prosecuted for a misdemeanor. Minn. Stat. § 365.37, subd. 5. An officer who violates the conflict of interest prohibition by contracting with his or her town without following proper procedures could be prosecuted for a gross misdemeanor. Minn. Stat. § 471.87.

Town clerks and officers serving as election judges need to pay particular attention to the fact that there are a variety of criminal penalties associated with failing to properly follow the election laws in conducting elections. Minn. Stat. §§ 201.27; 204B.26; 204C.12. Intentional violations of some election laws are a felony.

**Federal Claims**

Towns are also subject to suit based on federal law and the United States Constitution. One of the most common federal claims is a “Section 1983” claim. 42 U.S.C. § 1983. A § 1983 is one that is brought when a person believes their Constitutional rights have been violated by a government or government official. A motivating factor for alleging a § 1983 violation is that a plaintiff who wins this type of suit can be awarded attorney’s fees. These suits are often based on a claim that a public official has used the power of his or her office to violate someone’s rights.
The Americans with Disabilities Act (ADA) is another example of a federal law under which a town could face federal action. 42 U.S.C. Chap. 126. Under the ADA, towns are required to make certain accommodations, both in its facilities and for its employees, for persons with disabilities. Attorney’s fees can be awarded if a violation is found.

There are a variety of other federal statutory and constitutional claims that can be made against towns. These include claims of violations of Federal wetlands laws; the First Amendment’s guarantee of freedom of speech and religion; and, the Fourth Amendment rights of due process and eminent domain.

**MANAGING LIABILITY**

Local governments have always struggled to reduce the risk of liability while still providing a broad range of public services. Every additional service or facility provided creates a new set of risks. In recent years more emphasis has been placed on risk management as a way to increase safety and reduce the exposure to liability.

One of the most common ways to manage risk, which many people do without even realizing it, is to purchase insurance. While towns should not rely on insurance as their only means of responding to risk, insurance coverage is an important safety net in case a lawsuit or a loss happens. To help towns obtain coverage, the Association established the MAT Agency in 1988.

The Association took a significant step toward improving the protection of its members with the creation of the Minnesota Association of Townships Insurance and Bond Trust (MATIT). MATIT is a self-insurance pool created under Minnesota law; one way to look at it is that creating MATIT allowed townships to work together to insure themselves rather than purchasing insurance on the commercial market. The creation of MATIT enabled the Association to establish additional self-insurance programs and to bring all of the self-insurance programs under a single trust. Most Minnesota towns now obtain insurance through MATIT.

The following briefly describes the Association’s self-insurance programs available through MATIT. Please note that these descriptions are very general and do not provide an interpretation of the coverages. The existence and scope of coverage always must be determined under the facts of a given situation.

**Consolidated Liability Coverage**

To simplify the lives of town officers regarding their insurance coverage, the Association developed a package policy which combines a town’s Errors and Omissions, Property, Auto & Liability, and Bond coverages in a single package.
A. Errors and Omissions

Public officials’ liability insurance, or errors and omissions (E&O) coverage, is a coverage that protects the town, its officers, and employees. In general, the E&O policy applies to claims made against the town for wrongful acts arising out of the discharge of duties on behalf of the town. A duty to defend a town against covered claims (i.e., provide an attorney and pay related defense costs) is included in the policy. Claims challenging a board’s decision regarding the establishment of a cartway, road improvement project, or rejection of a liquor license application are examples of these types of claims. These claims result in the highest number of litigated claims because there is nearly always disagreement on whether the town or its officers did anything wrong.

Excluded are claims related to criminal acts, pollution, governmental fines or penalties, personal injury, and property damage. Claims arising out of condemnation and eminent domain are also excluded, but the policy does provide for some defense cost coverage for such claims.

B. General Liability & Property

Another self-insurance program available to towns is the Property, Auto & Liability (PAL) program. This program offers a wide range of coverage to towns, including general liability, property, owned auto, hired and non-owned auto, valuable papers, inland marine, crime, computer, employer’s liability, and firefighter liability coverage.

C. Clerk & Treasurer Bond

Town clerks and treasurers are required to give their board a bond before entering upon the duties of office. The bond is conditioned on the faithful discharge of the clerk and treasurer’s duties, and additionally covers deputy clerks and deputy treasurers. MATIT provides these bonds and notifies the county auditor of their existence.

Workers’ Compensation

Workers’ compensation is a statutory program that provides payments to employees for injuries or diseases that arise out of and in the course of employment. All employers are responsible for paying workers’ compensation benefits to employees who are entitled to them under the statutes. Many towns contract for services and don’t believe they have employees. But many towns use election judges when conducting elections; election judges are employees.

Other Coverages

From time to time towns need insurance policies or bonds others than those listed above. Examples of these other coverages include law enforcement liability, special events, liquor liability, and additional bond coverage. The Association’s Agency can work with towns to determine if additional insurance is needed and help them in acquiring that coverage.

Other Means of Managing Risk

There are a variety of other opportunities for towns to manage their risk. The starting point for many of these efforts is the ever-increasing number of worker and workplace safety requirements. One program required by OSHA for towns with employees engaged in certain activities is the Workplace Accident and Injury Reduction Program (AWAIR). Minn. Stat. § 182.653, subd. 8.
Towns covered by this requirement need to develop a written plan that assigns responsibility to implement safety reviews and programs. An annual review of the plan is required.

Some towns use safety checklists as a way of reducing potential problems. These checklists cover everything from playground safety to road maintenance and inspection duties. By establishing a written list of items to consider when carrying out an activity the board can reduce the likelihood that something will be missed and the completed lists can serve as documentation of maintenance activities and reviews.

Another significant means of limiting liability is for the board to establish policies regarding how it performs certain activities. For instance, boards should give serious thought to adopting a snowplowing policy. A town is in a much better position to defend against a snow-related claim when it can show that it was carrying out its activities in accordance with a carefully considered written policy. Caution must be taken with the adoption of written policies, however, because they can also be used against the town if the board fails to follow it. Therefore, if a board determines a written policy would be beneficial, draft it very carefully, update it as needed, and be sure it is being properly implemented. It is a good idea to review all board policies at the town’s reorganization meeting.

One of the most common ways to shift all or a portion of particular risks to others is by agreement. Contracts for services should contain hold harmless and indemnification clauses. Making sure that contractors the town works with are adequately insured is an important first step in managing the town’s risk. Also, in some cases the board can require a person asking for its permission to include the town as an additional insured on their insurance policy. Being named on someone else’s policy can provide an additional layer of protection for the town.