

# **PROCEDURAL SAFEGUARDS FOR TOWNSHIP OFFICERS**

## **Introduction**

Townships are vested with a great deal of authority and discretion. As long as Townships and their officers follow proper procedures, many if not most of their decisions are immune from suit or other challenge. If Townships or Township officers fail to follow the procedural safeguards and steps required of them, however, their decisions become open to challenge and, in some circumstances, the Township officers may expose themselves to personal liability. Depending upon the situation, the difference between a decision which is immune from suit or challenge and one which could open the Township's officers to personal liability may be a matter of whether proper procedures were followed.

You are in control of the procedures you use in conducting your Township business. Unlike many of the other events in life that can generate lawsuits, such as automobile accidents, most of the disputes surrounding Township actions are based on a deliberate decision of the Town Board to undertake a certain activity or to act in a certain way. Since you know that what you are doing will, from time to time, be the subject of controversy and possibly legal challenges, it is incumbent upon you as elected officials to make every effort to conduct your business in a manner which minimizes potential exposure to claims and lawsuits.

This presentation will highlight several important areas in which proper procedures can safeguard Town decisions and Town officers from suit or other challenge. It is important to note that the areas set forth in this presentation are some of the more obvious or more important areas for this issue within Town government. The basic concept that following proper procedures will protect the Town and its officers applies in nearly every setting in local government law. This presentation merely addresses some of the areas where we have seen the most common problems arise.

## General Guidelines

### A. Scrupulously Follow Statutory Requirements

In many cases, the duties you will undertake as a Township officer are closely governed by statutes. Often, those statutes will provide procedures to be followed. Before undertaking a statutory activity, you should spend the time necessary to familiarize yourself with the requirements of the statute and any procedures set forth therein. While this may sound simplistic, it is a point we often see overlooked in the lawsuits that we handle on behalf of Townships.

Frequently the requirements for an activity will be set forth in the language of the statute governing the activity itself. For example, in the planning and the zoning statutes there is a requirement that a public hearing be held. See Minn. Stat. ' 462.355. The plain language of that section requires ten days published notice of the public hearing. The statute describes what the notice must contain, and how it must be published. There is nothing difficult about the statute, but you must follow the letter of the statute to comply with it.

Another good example is found in the Town Road statutes. The basic Town road statute found at Minn. Stat. ' 164.07 requires that the Town provide notice to the occupants of land, when a road vacation, establishment or alteration proceeding is undertaken. The notice must also be posted, and must describe the names of the owners of the land over which the road passes. The statute makes a specific and deliberate distinction between owners and occupants, who may well not be the same people. While neither owner nor occupant is a difficult concept, the failure to properly follow the requirements of the statute can result in the invalidation of your proceedings. If your proceedings were followed by some road alteration or construction, and then you find the proceedings were invalid, you may well face a claim for trespass or inverse condemnation.

These are simple and somewhat simplistic examples of the kind of procedures that we see on a day-to-day basis in Township litigation. Every statute a Township is required to follow has similar requirements. Towns can protect themselves by carefully reading the statutes describing the activities they undertake and by following the requirements of those statutes to the letter.

Officers of Towns that have Township attorneys have no doubt seen that your attorneys are constantly quoting the letter of statutes and looking up statutes, even when they know the statutes. The lawyer is not simply trying to look important (usually). Attorneys know that there is no way they can remember all of the procedural formalities of every area of the law they may need to deal with. They constantly look up and reread statutes they have read dozens of times to be sure they follow each procedural requirement of the statutes.

Another benefit of constantly reviewing the statutes is that reading the statute forces you to consider the extent and nature of your authority. Townships are creatures of statutes and do not possess unlimited powers. Reading a statute that permits a certain kind of activity prior to undertaking such an activity will not only educate you as to the procedures to be followed, reading the statute will also help clarify the nature of your authority to act.

There are certain statutes, which frequently apply regardless of the proceeding you are undertaking and which, if not followed properly, can result in a challenge to the Town's actions. When undertaking the following activities, you should consider the procedural requirements set forth in these sections.

Special meetings	Minn. Stat. ' 471.705	Open Meeting Law
Passage or amendment of Ordinances	Minn. Stat. ' 365.125	Ordinance Formalities
Planning and zoning	Minn. Stat. Chapter 462	Municipal Planning Act
Contracting	Minn. Stat. ' 471.345	Municipal Contracting Law

An unparalleled resource to assist you in complying with the various statutory requirements of Township government is the Handbook published by the MAT. It is simply the best reference book available for Towns, their officers and attorneys. The Association makes the book available at a nominal charge. Get a copy and read it.

**B. When in Doubt, give More Notice, not Less.**

Many statutes require very specific notice of activities the Town intends to undertake or has undertaken. There are literally dozens of examples of specific notice requirements found in the statutes. Some statutes require published notice of activities (such as public hearings for planning and zoning Minn. Stat. ' 462.355). Other statutes require posted notice of activities (Open Meeting Law, i.e. posted notice of special meetings Minn. Stat. ' 471.705). There are also requirements of personal notice for some activities. (i.e. road activities Minn. Stat. ' 164.07).

Frequently, the requirements of the various statutes will appear to conflict or at least impose repetitive or duplicative requirements. In a situation where there is any uncertainty, we always recommend that you give more notice, not less. A typical question along these lines that we would be called upon to address might sound like this:

Assume a Township Board meets the second Tuesday of each month. The board intends to meet to hold a road hearing on the Monday prior to the Board meeting, at which not only will the board consider a request to vacate a given road, but it will also consider a request for reimbursement to one of the landowners for certain work on the road. At least two notice statutes may apply in this situation. The Town road statute requires 10 days posted notice, and personal service on the occupants of the land to be accomplished by the petitioners, not the board. Minn. Stat. ' 164.07. The Open Meeting Law requires, at a minimum, three days posted notice since this hearing is a special meeting. Though the notice provided by the petitioners of the road hearing probably would satisfy the Open Meeting Law, that notice will not address the second activity for the special meeting - the reimbursement request.

In this situation, you should provide two notices. In addition to the notice the petitioners will provide, the board should post a special meeting to address the reimbursement request.

3. Document the Reasons for Your Decisions to Ensure They Are Immune from Suit, and That They Will Be Upheld

1. Immunity

Towns make many decisions. Most of those decisions involve at least some aspect of consideration of the Town's budgetary constraints, the priorities of the Board, and the desires of the public. When a governmental body makes a decision which takes into account these factors, the decision should usually be immune from suit. Minn. Stat. ' 466.03 provides governmental immunity for

Subd. 6. Discretionary acts. Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

>Discretionary Acts' are acts which originated from a balancing of political, social and economic factors.@ Angell v. Hennepin County Regional Rail Authority, 578 N.W.2d 343 (Minn.. 1998). The immunity applies only where the decision involved a balancing of policy objectives rather than merely a professional or scientific judgment." Id.

In order for this immunity to apply if the Town is sued, the Town would have to convince a judge that the decision the Town made was based on the listed policy-based factors and was not simply an operational decision. The very best way to establish this discretionary immunity is to create findings, at the time of the decision and a record establishing that the Township considered these factors and is entitled to the protections of Minn. Stat. ' 466.03. The courts will apply governmental immunity where it is clear that such application is appropriate. However, the courts have also held that governmental immunity from suit is disfavored. Therefore if it is not clear from the record that the immunity should apply, the Town typically will not be given the protections of this statutory immunity and may be liable for claims it could otherwise have avoided.

An example of the kind of finding which will tend to be upheld as falling within the Township's immunity compared with one which would not likely be upheld by were inadequately as follows:

On January 28, 2000, the Town Board considered whether to expend \$100,000 of Township funds to upgrade lighting on the Township's snowplows. Extensive discussion was had. Members of the public spoke in favor of upgrading the lighting, commenting that improved lighting will enhance public safety by making the snowplows more visible to traffic, snowmobilers, and pedestrians. Supervisor Jones expressed concern that the Township does not have adequate funds to both enhance the lighting on the snowplows and provide the additional gravel which the township has indicated it would be placing on all of the roads around the townships lakes in response to concerns that those roads tend to get icy. Several members of the public, including residents on those roads, spoke up in favor of the additional gravel and maintenance on the roads around the lake as opposed to spending the money on plow lighting, pointing out that while additional lighting on the snowplows may

be a good idea in the abstract, there had already been problems on the roads around the lake and that therefore those problems were more pressing than the potential problems that the snow plow lighting was designed to address. Supervisor Anderson, after consulting with the town treasurer, stated that the town simply did not have sufficient funds to both place additional gravel on the roads and also upgrade the snowplows. Other members of the public commented that there were large number of children who lived on the roads near the lake and that to improve safety on those roads was an immediate need. Board Chair Smith pointed out that the lighting on the snowplows would be a benefit to all children in the Township as well as people who did not live near the lake.

More public discussion was held. Several residents who live on the roads near the lake where the proposed additional gravel would go described situations in which they had felt that the roads were unsafe or had seen cars slide off of the roads. Other members of the public described situations in which they felt that the snowplows for an adequately lighted and that they had felt this was a safety issue. Supervisor Anderson again reminded the crowd that the town simply did not have funds to accomplish both the new lighting and the improved roads this year.

After receiving all public comments, Board Chair Smith closed the public portion of the discussion. Supervisor Anderson moved that, based on the Town's limited financial situation, the input of the public, and his personal opinion that more public good would be brought by fixing the known problem of gravel on the roads than by a significant capital improvements in the snowplows, that the town not to expend money on additional lighting for its snowplows this year. Further discussion was had regarding the political impact of this decision as well as discussion of when there might be funds available to undertake this task. Motion to not expend the funds seconded by Jones, passed unanimously.

The foregoing minutes would provide a township with a very strong immunity argument in the event of a lawsuit regarding the lighting on its snowplows. The minutes documents that the board considered political factors, social impacts, and the economic factors and realities of the township in making its decision. Though no set of minutes are completely bulletproof, the town would be in very good shape under a challenge to the decision regarding the lighting if the township made its decision based upon the minutes listed above.

Unfortunately, the more common township minutes on a decision such as this would tend to read as follows:

On January 28, 2000, the Town Board considered whether to put additional lights on the town's snowplows. After discussion, Anderson moved to not buy the lights. Motion seconded by Jones, passed unanimously.

It is by no means and exaggeration to state that either of the foregoing examples could have come out of the same meeting. The second example does not address the debate that took place, the political, social, or economic factors that were considered, nor the reasoning of the board. The second example is simply much more likely to be struck down by a court as not involving the proper decision-making process to entitle the town to discretionary immunity.

Obviously, the issue of the sufficiency of the minutes is in the first instance a question for town clerks. However, the board approves the minutes and it is the responsibility of the entire board to make sure that its decisions are upheld. Therefore, when dealing with an important decision or one which may later be subject to challenge, the entire board should take an interest in making sure that the minutes accurately reflect the board's decision-making process. The board should further make the effort to be sure that its debate considered the appropriate factors to entitle the township to immunity.

#### 1. Ensure That Your Decisions Will Be Upheld

Clear findings and a good record are important not only in cases with potential tort liability. Many, if not most, of the cases that we see brought against Townships arising out of Township decision-making are declaratory judgment actions in which no money damages are sought. In those cases, the plaintiffs are typically seeking a different decision than the Town Board originally rendered. The most frequent example of this kind of situation arises in the case of a zoning decision. A typical zoning lawsuit would have the following attributes:

The Township has a zoning ordinance, which provides that certain activities are conditional uses. The ordinance requires that prior to granting a Conditional Use Permit, the Township considers several factors such as:

- (1) Whether the proposed use will be injurious to neighboring property values;
- (2) Whether the proposed use will alter the essential character of the neighborhood;
- (3) Whether the proposed use will introduce activities injurious to Town or private property such as excessive road wear, etc.

The ordinance will usually state that the permit cannot be granted unless the Town finds in favor of the applicant on all of the factors. The cases going to suit often feature an applicant who failed to show that the proposed use met all or some of the criteria in the ordinance. The Town was correct in denying the application. The Township, however, rather than making specific findings on each of the elements set forth in the ordinance, simply passes a resolution denying the application. This case, which the Town should win, based on the merits of the suit, is one that will in fact be very difficult to win because the Town failed to document its decision.

Just as in the immunity question, it is extremely important for town board to document their decision-making process in zoning matters. The following two examples are roughly taken from matters we have defended. The first constitutes good and adequate findings, which would tend to be upheld, in the second constitutes findings which would tend to be overturned by a court.

On January 28, 2000, Susan Smith appeared before the town board requesting a conditional use permit to build a large pole barn on her property. A number of her neighbors appeared to oppose the request. Joseph Johnson, a Realtor, stated that it was his opinion that the large pole barn, so close to his property, would devalue his property. He indicated his strong opposition to the pole barn. The board questioned Smith as to whether she had any

documentation or information that would tend to show that the pole barn would not affect Johnson's property value. She had no such documentation but indicated her belief that his property value would not be affected. Other nearby residents also complained that their property values would be adversely affected. Andrew Anderson pointed out to the board that the neighborhood in question is a residential neighborhood where most of the properties have two or three car garages and no one has any kind of detached storage building beyond small utility sheds in their back yards. He was very concerned that the presence of a large pole barn would give the neighborhood the appearance of a farming or industrial area as opposed to a residential area.

Supervisor Filibuster asked Smith when she intended to use the pole barn for. Smith stated that she plans to fill the pole barn with inventory for her home business, a flag stone wholesale business. Filibuster asked Smith how she intended to move her inventory to and from the pole barn. Smith indicated that customers would be coming to her house and that she would take them in their vehicles to the pole barn work on they would take inventory materials from Smith's business, loaded in their cars and drive a way. Smith indicated that she expected between 25 and 50 customers per day, six days a week. Smith stated that her inventory will be delivered three times per week in a semi truck.

The board took additional comments, and closed the matter for public discussion. The board discussed Smith's request as it applied to the zoning ordinance. After discussion, supervisor Filibuster moved as follows:

The Township Board makes the following findings and denies Smith's conditional use permit application for the following reasons:

(1) whether the proposed use will be injurious to neighboring property values;  
The board finds that the proposed use applied for by Susan Smith will be injurious to property values. A Realtor testified before the board that was his professional opinion and experience that the pole barn and related activities will negatively affect the values of neighboring properties. Smith could offer no evidence to the contrary. Therefore, the board finds that Smith has failed to show that the proposed use will not be injurious to neighboring property values, but rather that the evidence before the board tends to show that property values will be negatively affected.

(2) whether the proposed use will alter the essential character of the neighborhood;  
The board finds that a flag stone wholesale in business, which will require 25 to 50 additional cars on the road each day, construction of a large commercial building, and the presence of semi truck on the towns road to three times per week will alter the essential character of the neighborhood, which presently is a quiet residential neighborhood with no commercial uses.

(3) whether the proposed use will introduce activities injurious to town or private property such as excessive road wear, etc.

The board finds that the road in question is a residential road, not paved, and which is presently used for 10-15 trips per day in private automobiles. The proposed use would at least double if not triple or quadruple the wear on the road, and would also introduce the

presence of large semi trucks loaded with flag stones which would be extremely injurious to this gravel road. The applicant has offered no information or explanation as to why this would not be the case.

Therefore, based on the foregoing findings, the board resolves to deny the application of Susan Smith for a conditional use permit to build a pole barn on her property in the Township. Motion by Filibuster, second by Anderson, passed unanimously.

These findings obviously address each of the requirements of the zoning ordinance. The minutes adequately document that there was evidence in the record to support each finding. A reviewing court would have a very hard time overturning these findings and this case would very likely be dismissed by the court without any kind of evidentiary hearing or discovery taking place beyond the exchange of the minutes, findings, and other records of the proceeding before the Township.

An example of minutes that may not survive judicial review might be as follows:

On January 28, 2000, Susan Smith appeared before the Township Board to request a conditional use permit to place a pole barn on her property. After discussion, motion made by Filibuster to deny the permit for failure to meet the requirements of the zoning ordinance. Second by Anderson, passed unanimously.

We have defended many cases in which, after the suit was commenced, we have gone out to meet with the Township and have learned they had very specific information showing that the applicant did not meet the requirements of the ordinance and tended to very clearly support the Town's decision. The fact that the Town failed to make specific findings or document the reasons for its decision can be fatal to the Town's ability to defend the case even where the Town had good reasons for its decision. It is therefore essential that Townships make complete and comprehensive documentation of their decisions.

#### **D. Build a good record**

It would be impossible to overstate the importance of building a good record of Township decisions. Perhaps in this area more than any other, the Township has the power to not only influence but in fact assert complete control over the outcome of any challenge to the Town's decision.

The Supreme Court of the State of Minnesota has held that when a city or Town makes a decision interpreting an ordinance, if a fair and complete record of that decision is available, the courts can only review the decision based on that record and must affirm the decision if there is evidence in the record which tends to support the decision. Swanson v. City of Bloomington 421 N.W.2d 327 (Minn. 1988). The Swanson case also states that if the local governmental body failed to create a fair and complete record of the process, that the District Court is to reopen the hearing, take new evidence, and make its own decision. The difference between these two outcomes is enormous from a perspective of local governmental powers.

Where an adequate record exists, the Town benefits from one of the most deferential standards of review available in the court system. The courts have specifically held that when conducting a "record" review, even if a judge disagrees with the local body's decision, the judge must affirm that decision if there is evidence in the record to support the decision. This means that the Township is never subjected to a trial, very little discovery takes place, and the Town, frankly, should win nearly every time because there should always be at least some evidence in the record that makes the Town's decision at least debatable.

Where no adequate record exists, the Town's chance of prevailing decreases dramatically, and the expense and delay, as well as the inconvenience of the lawsuit, increases exponentially. In that situation, the Swanson case requires the trial judge to reopen the evidence and make an independent decision. This means that rather than having the trial court simply review the documentation from the Township and determine if there is support of the decision, the court permits the parties to engage in discovery, including depositions of witnesses which can take many months and cost a great deal of money. Once that process is finished, the court then holds a trial. At the trial, rather than simply looking to see if there is some evidence to support the Town's decision, the court will take it upon itself to make its own independent decision about what is correct. In that situation, the Town has completely lost not only the favorable standard of review, but has really also lost its own decision-making power. Without an adequate record, the Town invites a judge to second guess its decisions and reverse those decisions if the judge disagrees with them. For these reasons, it is absolutely essential that the Township build the most complete and comprehensive record it can when deciding upon permit applications or other decision requests brought to it by the public.

#### **E. Hire a lawyer and take the lawyer's advice.**

At the risk of sounding self-serving, anytime you undertaken an activity wishes new to the Township or which is more complicated or somehow different than your usual business, paying your Township lawyer to review the situation and your proposed steps is money well spent. The lawyer will read the applicable statute carefully, and, assuming your lawyer is familiar with Township and municipal law, may be able to identify statutes which apply but which are not directly found in the statutes authorizing your particular activity.

For example, Township planning and zoning authority including a certain amount of procedural information related to that authority is found in chapter 462 of Minnesota statutes. Chapter 365, however, sets forth the requirements for publication and dissemination of new ordinances. To be cautious, most lawyers would advise a town which has followed all the procedures found in chapter 462 nonetheless comply with chapter 365 regarding new ordinances. Chapter 365 is not referenced in chapter 462 and therefore without the assistance of your lawyer or someone else familiar with planning and zoning, your town may find itself defending an ordinance against a charge that your ordinance is invalid because it was not posted or published properly.

Another benefit of hiring your lawyer and following the lawyer's advice is the assistance that provides you in establishing good faith and proper motive if you are challenged. Frequently, when Town decisions are challenged, a plaintiff thinks the board is "out to get him". The argument that a town Board offers in this situation is that if the Board wanted to accomplish something illegal or

sneaking, it would not have hired an officer of the court to assist with the formalities. Further, the argument goes, if the board merely acted on and consistent with the advice of counsel, the board is almost conclusively presumed to have acted in good faith.

This does not get you out of every challenge. Good faith is not a defense in many circumstances. However, it is a defense in certain circumstances. For example, establishing good faith in an open meeting Law case eliminates the possibility of an award of attorneys fees to a plaintiff. See Minn. Stat. section 471.705. Another example of a situation in which the subject of intent of the town board may have significance is found in the tree cutting statute, Minn. Stat. ' 561.04. In that section, the Township is immune from certain damage claims so long as the Township had probable cause to believe that it had the right to cut the timber at issue.

In the two above listed examples, as well as in many others, if the Township can establish to the court that, for example, the town's meeting was held in accordance with the advice of counsel, even if that advice turns out to have been wrong, it will be very difficult for a challenger to establish to the board knew they were wrong when they were merely following the advice of their attorney. Similarly, advice from counsel that certain trees may be cut the Township provides a very strong argument for the Township to use when trying to explain that it believed (had probable cause) that it had the right to cut the trees it cut.

Your lawyer will offer you advice on how to properly follow statutory proceedings, The existence of the lawyer should help you establish that your actions were taken in good faith. For these reasons, it is worth retaining counsel for assistance in any kind of unfamiliar or complicated statutory proceeding.

## **Conclusion**

Townships have a great deal of control over the manner in which they conduct their affairs. Carefully conducting Town affairs within statutory requirements will dramatically reduce your chances of being sued, and will dramatically increase your chances of winning any suits that are brought. Following statutes to the letter, giving lots of notice, and documenting your decisions will help keep you out of the courtroom.