Top Ten Ways to Minimize Litigation Exposure for Small Municipalities

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It is impossible to completely remove all chances of a community being sued. There are ways, however, by which to minimize exposure to litigation and to reduce the chances of any litigation being successful against a local unit of government. Municipal attorneys can play an important role in helping their clients avoid lawsuits by reminding them about key issues that result in lawsuits, and by providing advice and assistance on how to minimize the risk of litigation over these issues. The following suggestions are easy, but frequently forgotten, tips that municipalities can use to minimize the risk of being sued (at least successfully) over common but avoidable problems:

1. Avoid Undo Delays in Decision Making. Frustration with the amount of time it takes a governing body to make a decision leads to a number of lawsuits. In a state like Minnesota where there are "automatic approval" statutes that establish an absolute deadline by which a decision must be made, it is very important to watch the calendar or the governing body may find itself being ordered by the courts to grant the permit, etc. even if it conflicts with the provisions of a local ordinance or other regulation. The clerk should get in the habit of marking on his or her calendar the absolute deadline for taken action so that the governing body does not miss it.

2. Document, Document, Document.

    a. All Decisions. In addition to maintaining a record of all votes, a governing body needs a good record to support their decisions. The lack of documented reasons for their decisions is a leading cause of municipalities being successfully sued for acting in an "arbitrary and capricious" manner. Good minutes that summarize all discussions and hearings held on the issue, files of supporting studies and reports relied on by the governing body, and whatever other documentation supports their decision, are all important tools for avoiding and defending lawsuits.

    b. Contracts. It is still fairly common for small communities, particularly in rural areas, to conduct business on a verbal agreement and a handshake. Problems, of course, arise when there is a disagreement on what had been agreed to, the standards to which work was to be performed, etc. This is particularly true when there has been a change in elected officials between the time the alleged agreement was reached and the time performance was to have been completed. Thus, no work should be done involving the resources of a municipality until all terms are carefully spelled out in writing. A good indemnification clause and requiring proof of insurance,

as well as performance and payment bond requirements, are all important considerations for contracts.

c. Developer Agreements. Essentially a type of contract, written developer agreements can be a very useful tool in areas with new development or experiencing redevelopment, especially when the developer will likely expect some sort of action from the governing body such as the taking over of roads. These agreements should specify who is responsible for what, the standards and codes to be satisfied, what constitutes completion, etc.

3. Draft Ordinances Carefully. The first step in drafting a good ordinance is to verify the authority for the regulation being developed. Municipalities can generally only regulate those matters which has been authorized by their state legislatures and which have not been preempted by either state or federal regulations. Unauthorized ordinances can result not only in having enforcement efforts voided, but also charges of violations of constitutional rights and other potentially serious and expensive claims against the local unit of government. Similarly, vagueness and overbreadth are two most of the most common challenges to attempts to enforce ordinances. Both can be avoided by careful drafting that includes:

   a. Using clear and simple language to avoid confusion over what can (must) or can not be done

   b. Providing a purpose statement

   c. Providing clear and non-circular definitions of key terms

   d. Tailoring restrictions to identified problems but without being too limiting

Ordinances should only be adopted if the governing body is serious about, and capable of, good and equal enforcement efforts.

4. Review and Update Ordinances on a Regular Basis. Even the most carefully drafted ordinance can become out of date due to changed circumstances, new statutes, case law, etc. It is, therefore, essential that ordinances be reviewed and updated on a regular basis. Unenforced ordinances, or ones that become unenforceable due to legislative changes or court actions should be repealed.

5. Beware of and Follow All Notice Requirements. Keeping the public informed of what the governing body is planning to do is required by open meeting or "sunshine" laws in most states. Special notice requirements frequently exist for actions such as conducting public hearings, incurring debts, soliciting bids, etc. Technical and inadvertent violations of these notice requirements can result in actions being undone and damages being awarded to aggrieved parties.

6. Plan Ahead. Governing bodies tend to be reactionary rather than proactive. This can result in a loss of the ability to regulate a potential problem, and it can lead to challenges that a regulation is unfairly targeting a particular person or group.

7. Watch What You Say. While slander and libel issues do exist, the more common legal challenges and possible liability exposures come from elected officials and hired staff making unauthorized promises, making specific but erroneous recommendations about how to comply with state laws and codes, making statements that exceed their authority, or making comments that undermine the credibility of a decision that has or is about to be made.

8. Use Professionals. Most elected officials in small communities are essentially well intentioned volunteers. They bring with them there respective backgrounds and expertise, but it is unlikely that the governing body will have an attorney, engineer, financial advisor, and other such professional serving in office, especially not at the same time. Thus it is essential for the governing body to understand the importance of recognizing their own limits and working with the proper professionals for studies, planning, advice, etc. Municipal attorneys must also recognize their limits and refer their clients to "specialists" as needed for things like bonds, employment and labor law, etc.

9. Understand Public v. Private Data. Most states have a law that governs what information must be made available to the public upon request, what information can be released in certain situations, and what information is not to be released under any circumstance short of a court order. While even an inadvertent release of data that is not considered public data can result in litigation and severe penalties, ironically the failure to release public data generates at least as much if not more litigation against public entities.

10. Adopt Policies, Procedures, etc. Making things up as they go is a sure way for a governing body to be sued for being arbitrary and capricious, unequal treatment, and similar claims. Adopting rules of procedure for the conduct of meetings, criteria for granting and denying permits and other requests, tracking compliance with data practices (see #9), etc. will help reduce the likelihood of a successful legal challenge. Of course, the failure to follow their own policies and procedures can give rise to other types of challenges, so once adopted it is important for the governing body to follow their policies and to review and update them as needed.

Resources:

Municipalities:

- Statewide Municipal Associations
    - www.mntownships.org

    - www.lmnc.org

- Professional Associations

- MCC List-servs (www.municode.com)
    - clerks
    - managers

Municipal Attorneys:

- American Bar Association
    - Public Lawyer Section

- State and Local Bar Associations
    - Public Law Sections

- IMLA (www.imla.org)

- MCC Attorney List-serv (www.municode.com)