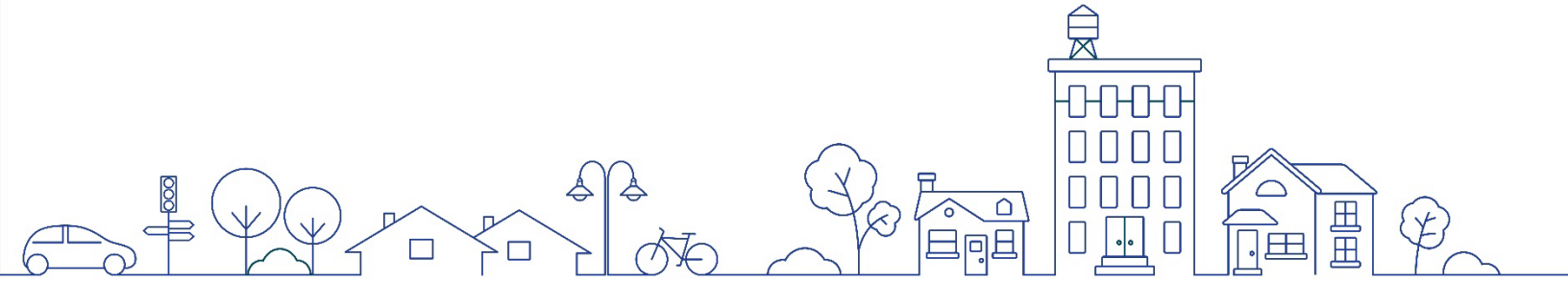
CHAPTER 16:
TORTS



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Chapter 16: Torts

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The LOC sincerely thanks Kirk for his work on this chapter.

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Newly elected councilors brim with energy and good intentions. Sometimes, however, a new council person's enthusiasm can lead them to make avoidable mistakes and wind up being individually named in a lawsuit. This chapter aims at highlighting the top mistakes made by elected officials. We hope you are entertained by the foibles of those who went before you, and, that you will learn how to avoid becoming a future example in this guide yourself.

I. Common Mistakes Made by Elected Officials

A. Assuming you are the leader.

You ARE a leader, and you deserve to be commended for that. But many City Councilors mistakenly assume that they are THE LEADER and forget that their power only comes from acting together with their fellow councilors.

Remember, you are part of a leadership *group*. Stay away from individually managing city staff and resist the urge to make quick changes by taking management duties upon yourself.

Success Hint: You are a Councilor now, you get to leave the day-to-day stuff to others!

B. Anyone who votes against you commits an ethics violation.

Of course, you are right on this issue that you care so much about! But keep in mind that even though you were chosen by the voters, reasonable people may still disagree.

Remember, the best way to implement the agenda you campaigned on is to convince other councilors of the benefits of voting in concert with you. Scaring your co-councilors into following your lead by reporting them to the Oregon Government Ethics Commission (OGEC) is not a strategy for long term success.

Success Hint: Oftentimes, honey really <u>is</u> better than vinegar.

C. Protecting the public from unpleasantness with executive sessions.

Of course <u>you</u> can handle the truth. And, as an elected official you will now be a part of what goes on behind the closed doors of executive sessions.

Remember, though, that Oregon's "Open Meetings" law means that aside from a few narrow exceptions (staff discipline, litigation, purchasing property) the public gets to observe you in action, taking care of the people's business.

Success Hint: Before going into executive session, don't turn to the audience and shout "You can't handle the truth!"

D. Not protecting staff from unpleasantness with executive sessions.

Hey, we do not doubt that your staff member messed up… and you are totally justified in being upset. But be careful where you express that sentiment.

Remember, one of the exceptions to the open meetings law is staff discipline, and unless the staff member in question wants a public discussion, it is there for a reason. If you have a problem with staff, get an executive session put on the agenda more than 24 hours before the next council meeting, and say your piece then.

Success Hint: The "public comment" period is not designed for councilors to comment publicly on the job performance of city staff.

E. Starting a blog / Facebook page / Instagram / TikTok to publicize all of the above.

You absolutely are allowed to communicate with your constituents. Of course, that is a dignified aim of any public servant. But be careful of what communications you stamp with your political Seal of Approval, which happens when you "approve" comments to your social media wisdom. Remember, social media is a magnet for the disaffected to anonymously vent their frustrations with city management, city staff, councilor ethics, and "what really happens" during Executive Sessions.

Success Hint: When you host their post, their words are your bond.

F. Terminating Staff on Your First Day/ Week/ Month

We at CIS watch city council elections closely, as we are very interested in who we will be working with, and working for, the next few years. In the not-too-distant past, I received a call in late December from a person whom I knew had won his race for mayor.

"Congratulations on your election!" I said. "That's great. You must be very excited."

"Well, I am excited to make some changes," he told me. "That's why I'm calling you, because I have asked the city manager for his resignation."

There was a pause. A long pause. Mr. Mayor-Elect had not even been sworn in yet and he was firing the city manager? The mayor continued.

"I know you have this PreLoss program at CIS, so that's why I'm calling. So, you know, to give you guys the heads up. Because if the city manager doesn't resign, then I'm going to fire him at our first meeting."

After 20 years of legal practice, not much can catch me off guard. This totally caught me off guard. I didn't know where to start.

"But you're not sworn in… you don't have the authority to fire someone by yourself, it requires a majority vote, and…"

"Oh, I got the votes!" the mayor interrupted. "City manager resigns, or he's gone. This is why I ran for office."

So, then I had to explain to the mayor-elect how we could not support this termination, and his city would be required to pay the Pre-Loss deductible if he went through with it now. However, CIS could support a termination where he and other new councilors take some time to observe the city manager after they get into office. And if they see deficiencies in his job performance, then to provide the city manager with a specific list and give him a certain amount of time to improve, like 90 to 120 days.

Also, provide the city manager with training and the support he needs to do the job the correct way; demonstrate that the city council is there to help the city manager succeed. Then, with the clear expectations, training, support, and additional time, if the city manager does not raise his job performance to meet your metrics, let him go.

And really, that's the pattern we want to see for all terminations at any level—where someone is told what's wrong, given the time and tools to improve, but for whatever reason they decide not to make a change. That's a winning, defensible scenario that is fair to everyone. But my new mayor friend wasn't having it.

"We're just going to have to agree to disagree on this one. The people elected me to make a change, two other councilors agree with me, and we're going to do what we were elected to do."

And sure enough, at Mr. Mayor's very first meeting he made a motion to fire the city manager. The city manager had waived his right to an open meeting, so council chambers was packed with his supporters. When the vote started, those supporters of his were LOUD. The people were so loud that the mayor couldn't even hear how the councilors were voting. The mayor then shouted at the people, "Come on people, act like adults!" People in the audience shouted back, "YOU act like adults, terminating our city manager on your first day!" It was a circus.

When all the yelling and shouting was over, the city manager was fired and the citizens were mad mad mad—so mad, in fact, can you guess what happened exactly six months later?

That's right, the mayor and the two other councilors who voted to terminate the city manager were all three recalled. And do you know why it was exactly six months later? Yes, because there is a six-month "safe harbor" during which a newly sworn in elected official cannot be recalled. Which shows how the people in this town were just waiting for those six months to be up.

G. Believing you are the city CEO and causing a "hostile work environment" for staff: (or, doing the city manager's job instead of your own).

There is a type of person who often runs for a city council or mayor position on the basis of their experience and success in the private sector. And their success is to be commended; their skills and leadership learned in the business world can absolutely contribute to their success as an elected official.

Occasionally, however, a councilor who is used to being the CEO of their own organization, forgets that the public sector is very different. The power of a city council comes from acting as a group. Individual councilors and mayors have no power at all. If you're newly elected and you want to effect the mandate of your election, you do that by convincing a majority of the council to join you in voting for new resolutions or ordinances. Alone, you can't do much of anything. As a group, you can make law.

Like I was saying, some people who have been a successful CEO and who have strong leadership skills move too fast after being elected. They don't take the time to learn how the "new company" (the city) is different from their old company, and that they must follow different rules. Instead, they start individually managing city staff, and start ordering quick changes to staffers' duties, titles, and job locations. This makes the permanent city staff feel stressed. They start complaining of a "hostile work environment" caused by the micromanaging city councilor.

Here is where this can get dangerous for you as an elected official: managing staff is outside your scope of authority. You do not have the power to manage the daily activities of staff. Those duties belong to the city manager or city administrator. City staff typically know this, and so they may threaten to file, or actually file, a "hostile work environment" claim against you.

There is good news and bad news when it comes to staff filing lawsuits against you. The good news is that Oregon statutory law requires your city to "indemnify and defend" you for any lawsuits that are filed against you for actions taken "within the scope of your authority" as an elected official. Your own personal checkbook will never be on the line for lawsuits that flow from your official duties. However, like I said, there is bad news, too. In the example above, the councilor who is micromanaging staff is NOT acting within the course and scope of their official duties. Managing staff is the city manager's job. So, if you cause a lawsuit by micromanaging

staff, you will be getting sued for actions that you took outside of your authority. And you will have to pay to defend yourself, most likely.

There is nothing to get scared about here. It is an easy fix: just let the city manager manage the staff. If you see an issue that simply must be addressed, talk to your city manager about it. That's all you need to do. You are a city councilor now—leave that day-to-day stuff to others.

H. Using your office for personal gain — the six words you never want to hear yourself say.

Now that you are a city councilor, people are going to treat you differently around town. That is unavoidable. When you have the power (when acting with your co-councilors) to make laws, people will view you in a different light than they used to. But you should not view yourself in a different light. It leads to all sorts of problems. Here is one example.

There is a city in Oregon, just large enough to have parking meters in its downtown core. Just the main drag downtown. Well, a person who had just successfully run for city council had a business that fronted that metered boulevard. This fellow owned an auto body shop, and he liked to park his own personal hot rod right out in front. So, what did he stop doing the day after he was sworn in as a new city councilor? You guessed right again —he stopped paying the parking meter in front of his shop.

So that day, the city meter reader began her shift by working her way down that city's primary downtown street. And the new councilor started watching her while he worked. He saw her moving from one car to another, checking meters and writing tickets. He watched until she reached his hot rod, parked directly in front of his store.

Now this meter reader, she was not a big imposing person like the councilor. She was petite and barely five feet tall.

The new city councilor saw the meter reader check his meter, get out her ticket book, and start writing out a ticket. Well, he rushed toward the street, burst out the front door of the store, threw his hand up and yelled. He yelled the six words that you never want to hear come out of your mouth as long as you are a city councilor: "DO YOU KNOW WHO I AM!?"

You never want to hear yourself say those six words, because that will be the beginning of the end for your time in public service. It never ends well after that. The meter reader burst into tears as the councilor continued yelling about how his position at the city compared to hers. She left and went back to her manager.

Her manager did all the right things. He told her how she had nothing to worry about, that she was only doing her job, and how the councilor was out of line. The manager told her to take the rest of the day off, and he would talk to his own boss, the city manager. When the city manager

heard what the councilor had done, he also said all the right things. He said he would talk to the councilor, that the meter reader had nothing to worry about, and that she had done the right thing when she ticketed the councilor's car.

Now just as the manager was leaving, who comes storming into City Hall and goes straight into the city manager's office and slams the door closed? The councilor with the shop on main street. And he was still mad. He was yelling loud enough that staff could hear him shouting that he wanted the city manager to fire the meter reader, and to do it now! Who do you suppose the staff shares this with? The meter reader. The next day she emails her boss and says that the city councilor has created a hostile work environment, based upon her applying the parking regulations to the councilor the same as she applies them to everybody else. So, she got a lawyer and sued the councilor and the city.

CIS had to settle this case because the meter reader was right. The councilor did expect her to bend the rules for him, just because he was a councilor. And when she didn't, he demanded that she be fired. In a perfect world, she would have got her job back and the councilor would have been the one who got fired. But councilors can't be fired. You are in a unique position that way, and you do have a lot of responsibility. Use it judiciously and go out of your way to make sure that everyone knows you expect to live by the same rules as everyone else in town.

And never, ever, say to anyone, "Do you know who I am?!"

We want your tenure in office to be a success, and hope that you can now avoid these three common potholes that have made the wheels come off a few elected officials who have gone before you. Remember that your power comes from acting as a group, not alone; you're free of the day-to-day stuff, which belongs to the city manager alone; and never act or talk like you deserve special treatment because of your position, or you're going to wind up all alone.

II. The Most Common Questions

Next, we are going to cover some of the most common questions we received from elected officials about the legal risks and liabilities that come with their office.

A. Are you "covered" by the city if you are individually names in a lawsuit?

This frequently asked question come from city councilors, city managers, police officers, public works people, and even a city receptionist. Mentioned above, any city employee, officer, or agent is protected from liability when they are carrying out their official duties. We had one police chief was very concerned that if he got sued in the course of telling his patrol officers how

to handle a high stakes situation (such as confronting an armed suspect or a high speed chase), he could be personally liable and forced to pay a plaintiff out of the chief's retirement savings. For this chief, and for every elected official and city staff person, here is the test for determining whether the city will pay the defense of a lawsuit and for any judgment.

1. If the person is acting within the scope of the authority of their job, then ORS 30.285 mandates that the city indemnify and defend the person. You will always be defended for your official decisions. Police will always be defended for how they arrested someone. Public works will always be defended if they get into an auto accident while driving to a job site.

2. CIS' Coverage Agreement pays the cost to the city of indemnifying and defending any employee who is sued for actions taken within the scope of their official duties or authority.

3. For example, if a police chief is directing officer how to best handle a high speed chase, then there is precious little doubt that the chief is acting within the scope of the chief's official duties and authority.

The point of separating out #1 and #2 is to emphasize that this is not a matter of "insurance." The city is required by law to "cover" any employee who is sued in their individual capacity, as long as the employee is doing their job at the time in question. Even if the city did not purchase insurance (like Portland and Salem), the city would still have to cover the employee.

The fact that your city has coverage with CIS just means that it will be easier for the city to pay for its statutorily mandated obligation to defend you. CIS insurance in no way changes or alters the fact that the law requires cities to cover their employees' official acts.
More than one elected official has been named in a lawsuit because a disruptive citizen was trespassed from a city council meeting. Believe me, you *will* want to do this, and it may very well be justified. So, next we cover how to do it the right way.

B. Excluding disruptive citizens from city property and council meetings.

While there are right and wrong ways to legally exclude a resident, there is also the issue of public perception. Reviewing the following scenarios and the suggested action steps will help your city to be prepared and proactive in working first to avoid issuing an exclusion, and then if necessary, doing it the legal way.

1. Scenario #1: "Fred's Snorting"

Fred, who owns multiple properties in town, is concerned that a potential zoning change adjacent to one of his lots will diminish his property values. Fred starts attending every city council meeting. While Fred sits in the back and does not say anything during the public comment periods,

he often sighs loudly, rolls his eyes, shakes his head, makes indignant snorting sounds, and mumbles unintelligible words under his breath. Fred engages in this type of behavior most frequently when the city manager or mayor are speaking.

Before the next city council meeting, which is expected to go long, the mayor informs the councilors that he is worried that Fred's "disruptions" will drag out the meeting, and that he is actually becoming fearful that Fred, who is a well-known hunting enthusiast, may even become violent. The mayor then asks the police chief to talk to Fred, and "see if he'll voluntarily skip this one. I don't want to deal with having to trespass him if he gets disruptive again."

The police chief then waves Fred out of the council chamber and into the lobby area and asks Fred to skip the meeting. "If you don't, I'm going to have to arrest you for trespassing." Fred rolls his eyes, goes back in to grab his coat, and tells a friend, "They're trespassing me from the meeting." Fred peaceably leaves the building.

Two months later Fred files a lawsuit against the city for violating his constitutional rights.

Suggested approach:

Although the mayor honestly felt threatened by Fred, and the city manager believed that Fred's sighs and snorts were disruptive, neither perception was enough to legally bar Fred from the city council meeting. A city official is not entitled to prevent an individual from attending a city council meeting that is open to the public unless the person disturbs the meeting.[1]

The U.S. Supreme Court has explained that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[2]

There is a difference between someone who distracts attention from the councilor who is speaking at the front of the room with a sigh or snicker, and someone who stands up and interrupts the speaker, effectively halting the meeting by insisting on speaking out of turn. Ninth Circuit case law has embraced the principle that "[e]ven in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive."[3]The law draws a distinction between a person who is a distracting nuisance, and someone who interrupts the official speaker.[4]

In the above scenario, the city loses the lawsuit because, in part, there was no actual disturbance. The police chief asked Fred to leave before the meeting even started. Fred's history of shaking his head and making disapproving facial expressions do not show that Fred actually interrupted a

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[1] *White v. City of Norwalk*, 900 F2d 1421 (9th Cir. 1990).
[2] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503, 508 (1969).
[3] *Norse v. City of Santa Cruz*, 629 F3d 966, 979 (9th Cir 2010) (Kozinski , J., concurring), *cert denied*, 2011 WL 4530331 (Oct 3, 2011).
[4] *See also Norwalk*, 900 F2d at 1426 (holding that an ordinance is not facially overbroad so long as it only permits city council officials to eject a person who disturbs or impedes the meeting).

meeting. Council members' honest belief that Fred would become disruptive if he were allowed to stay is not an actual disruption, and thus cannot support legally removing Fred from the meeting.[5]

Further, the mayor and police chief sought to get Fred to agree to leave before giving Fred "fair warning" that a second actual disruption would result in the city excluding Fred from the meeting. This is what the city's policy stated would happen, but no one stopped to consult the policy in the moments before the meeting was to start. Fred's lawyer, however, quoted the city's policy at length in Fred's lawsuit.

The mayor and city manager should not have used the city's police power, via the police chief, to pressure Fred to leave the meeting before it started because they perceived that Fred was likely to be distracting or embarrassing. Excluding a citizen from a meeting requires that the citizen actually interfere and disrupt the meeting. Merely being a distraction is not enough. Absent threats of violence, a citizen should be given a warning that further distractions will result in their removal. And while it's good to have a policy outlining what types of behavior will lead to having a citizen removed from a council meeting, the citizens and the councilors must follow the policy.

Finally, keep in mind that this scenario only addressed excluding Fred from a single meeting. If the city wished to exclude Fred from multiple future meetings then the city would need to provide Fred with due process and an ability to appeal the decision to trespass him. Before taking such actions, be sure to consult with your city attorney.

Scenario #2: "Library Love Notes"

A resident proclaims his romantic desire for a member of the library staff. Although his advances are unwanted, and the employee has made this known, the resident regularly follows the employee around and routinely sends love notes. The resident is polite but persistent. The behavior does not rise to the level where the employee could get a protective order from a court. However, the behavior does violate the city's policy on harassment. The library director wants to exclude the resident from the library.

Suggested approach:

Violating the city's policy on harassment is reason enough for a department head to speak directly to the patron. The patron should be told that his behavior is interfering with the employee's ability to perform her job. The department head should explain to the patron that he can use the library to check out reading material, but cannot leave notes or gifts for any employee, nor follow any employees around the library. Finally, the patron should be given a final warning: any further gifts, following employees, or behavior that is in any way threatening will result in being trespassed from the library. In addition to verbally warning the patron, the

[5] See *Tinker,* 393 US at 508; Norse, 629 F3d at 976.

patron should be handed a written letter which makes the same points in writing. A copy should be kept for the city's own file.

If the patron's behavior continues, it is important to narrowly tailor any trespass of the patron. For instance, do not trespass the patron from all city property for all time. Such an order would be overbroad.

Assuming the patron's behavior is directed toward only one library employee, the city could protect the employee by trespassing the patron from only the library, and only during the hours the harassed employee usually works. And provisions can be made to allow the patron to continue checking out material. The patron can be allowed to call ahead, come straight to the counter, check out a book that has been pre-retrieved, and then immediately leave. Even if it is known that the patron will never utilize this procedure, putting this in writing at the time the patron is trespassed will strengthen the city's legal position if the patron eventually gets tired of the trespass order and seeks to file a suit in court.

Scenario #3: "No Beverages Please"

Another library patron, this time an avid computer user, consistently disregards the "no food or beverage" rule in the library's computer lab. One day while using the computer lab the patron spills coffee on a keyboard, ruining it. The library director wants to exclude the patron from the library for a period of 30 days as punishment for breaking the rule.

Suggested approach:

Was the patron given a final written warning that they would be trespassed from the lab if they continued bringing in beverages? If so, then the library director must be reminded that the city needs to keep any exclusion of a citizen as narrowly tailored as possible. In this example, asking the patron to pay for the keyboard may be a better incentive to change their behavior than excluding them from the entire library for 30 days. If the patron refuses to pay for the keyboard, then the city should exclude the patron from only the computer lab for 30 days. After 30 days if the patron reoffends, they should be excluded from the computer lab for an extended period of time (90-180 days), but not from the library entirely. If the patron is excluded for an extended period of time, the library director needs to work with the city attorney to offer the patron due process and a way to appeal the decision to trespass her.

Scenario #4: "Unfair Termination"

A previously terminated city employee comes into city hall and waits for the city manager to walk out of their office. When the city manager leaves their office and enters the hallway, the former employee approaches the city manager and launches into a tirade about how their termination was unfair. The former employee does not make any threats but is loud and disruptive. After this occurs, on two separate days, the city manager wants to have the former employee banned from city hall.

Suggested approach:

This former employee wants to be heard and does not believe the city is listening. City officials should start by offering to meet with the former employee and provide them with an exit interview. It is important to make sure two people from the city are present. This offer should be in writing to the former employee, even if he will likely turn down the offer.
If the employee comes back again, the city's representative should tell them (again, verbally and in writing) that they have disrupted city business and must now leave. It must be specifically stated that if the former employee disrupts city business again they will be trespassed. However, the city should be sure to state that the former employee is welcome to come back and speak their mind when they have an appointment. If the ex-employee still will not leave, the city should then have the police remove them from the premises. City officials should also make sure that at this same time the city is still offering to set up a specific time to meet with the ex-employee and hear them out.

After the ex-employee has been removed once, if they refused to set up an appointment but still returns looking for the city manager, then the city can prove that the person does not just want to be heard, but is intent on causing disruption as a type of retaliation. In this case, the city should exclude the ex-employee from the portion of city hall where the city manager's office is located, but not from the entire building (if this is feasible). Again, the principle is to protect city personnel in a way that is the least restrictive possible to the citizen's rights. Cities should make sure to work with their city attorney to document that you have offered the citizen due process before any decision to trespass the ex-employee is finalized.

Disruptive citizens can frustrate staff and interfere with your ability to provide services to the public. The following action steps will help your city to issue an exclusion in a legal and defensible way:

1. A person cannot be excluded from a meeting or public place because the individual is a distraction—sighing and snorting loudly like Fred in the example above (Scenario #1).

2. In order to legally exclude someone from a council session, that person must actually interrupt the meeting and interfere with the progress of the official agenda. For example, if Fred had stood up and tried to shout down the mayor.

3. Absent threats of violence, a citizen should be given a warning that further distractions will result in their removal, whether the person will be removed from a council meeting, the library or city offices. Issue the warning verbally and, if at all possible, in writing as well.

4. If your city wants to exclude a disruptive citizen from multiple meetings or exclude a person from a specific city facility for an extended period of time, make sure the exclusion is narrowly tailored to fit the situation. Utilize the option that is the least restrictive of the citizen's rights. For instance, excluding a person from the library

computer lab but not the entire library.

5. If an exclusion will be issued for longer than a single event, such as excluding someone from all council meetings for 60 days, then the city will need to provide the citizen with due process and an ability to appeal the exclusion decision.

6. Before issuing any extended exclusion, be sure to consult with your city attorney.

The best way to stay out of legal trouble is to never get sued in the first place, and up until now that's been the focus of this section. However, you will witness firsthand that sometimes a citizen is so upset with a decision of the city council that they are determined to sue. You'll probably sense it, even before the final council vote is taken on the issue that has this citizen so fired up.

Fortunately, neither a city nor a councilor can be sued for voting the "wrong way" on an issue. This legal defense, called "discretionary immunity" is a powerful tool to protect you and your city, even before you get sued. Here's how it works and what you need to do.

III. DISCRETIONARY IMMUNITY: MAKING IT WORK FOR YOU AND YOUR CITY

Too often cities and counties are missing out on an important defense against liability: **discretionary immunity**. This can be an especially important tool in tough economic times when local governments are simply unable to fund important maintenance and other projects or staffing that might reduce exposure to risk.

For example, (and these are actual facts from a CIS claim in which the public body was found liable for the damage) a small city, with a small budget, has a sanitary sewer system that was installed about 80 years ago. The system has a 4-inch main. The city does a reasonable job of ongoing maintenance of its sewer lines but is well aware the lines are both undersized and in poor condition. As a result, the lines tend to become plugged.

The city's "policy" and practice has been to repair the system as it breaks down. However, there is no evidence this "policy" has been formally adopted by action of the city council. The city lacks the funds to upgrade the system. When the line becomes plugged through normal and foreseeable usage and backs up into houses causing damage, is the city liable? Under these facts, probably yes. But they likely could have avoided liability with a few simple (and cost free) steps to establish discretionary immunity.

Whenever a public body becomes aware of a hazard or condition that could potentially cause harm, there is arguably a duty to remedy the problem or face liability for resulting injuries. Often, in fact, the "notice" to the entity of such hazards comes by way of written safety recommendations from CIS risk management consultants. But the city may lack the funds to fix the problem or may have other needs they give a higher priority. If the problem is not fixed and there is an injury and claim, the safety recommendation (possibly now in the hands of the injured party's attorney through a public record or litigation discovery request) could actually aggravate the liability picture. Does that mean we should avoid making recommendations for fear they won't be complied with promptly? Not necessarily. Again, the best approach when circumstances do not allow immediate implementation of the recommendations might be steps to implement discretionary immunity.

A. What is "discretionary immunity"?

Public bodies historically were immune from liability altogether under the legal doctrine of "sovereign immunity" ("The King can do no wrong"). Oregon, like most states, has waived much of its sovereign immunity by passing a "Tort Claims Act" (OTCA), which provides the means and method for pursuing tort claims against public bodies. The OTCA also sets important conditions and limitations on public body liability, such as the 180-day notice requirement, caps on liability, and certain immunities, including discretionary immunity.

Specifically, public bodies are immune from liability for "any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."[6]

In practice this immunity has not proved to be as sweeping as it might sound. Courts have been fairly strict in their interpretation. Nonetheless, the immunity is available and the published court decisions provide good counsel on what needs to be in place for the immunity to apply…and it need not be that difficult in most cases.

B. What the courts have said.

The following is a short list of legal principles from some of the key cases that pretty well define the current state of discretionary immunity

1. Discretionary immunity defense requires evidence regarding actual consideration process by which decision was reached.[7]

2. A discretionary action requires the exercise of judgment involving public policy as opposed to the mere implementation of a judgment made by others.[8]

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[6] ORS 30.265(c).
[7] *Sande v City of Portland*, 185 Or App 262 (2002).
[8] *Ramirez v Hawaii T and S Enterprises, Inc.*, 179 Or App 416 (2002).

3. Where a public body exercises consideration of alternative methods of fulfilling non-discretionary duty to act, the public body is immune from liability for failure to make discretionary choice among alternatives before injury occurred.[9]

4. Decisions such as the design, location, and installation of traffic signals, or the makeup of programs such as tree and sidewalk maintenance at the policy level of government are typically immune from liability.[10]

5. Where there is a failure to implement or perform established inspection or maintenance programs, discretionary immunity likely will NOT apply.[11]

6. To qualify for discretionary immunity, the public body must show that it made a decision involving the making of policy, as opposed to a routine decision made by employees in the course of their day-to-day activities.[12]

7. "The decision *whether* to protect the public by taking preventative measures, or by warning of a danger, if legally required, is not discretionary. However, the government's choice of *means* for fulfilling that requirement may be discretionary."[13]

C. Practical steps to make it work.

While there is no clear set of instructions guaranteed to establish discretionary immunity, the case law provides guidance on key elements that should be considered.

- Consider whether the matter involves the expenditure of public funds not already specifically budgeted. Consider also whether it involves a choice among competing alternatives, even if money is not the issue. (E.g., there are two types of warning devices available, each with its own advantages and disadvantages, and only one can be used.) If so, discretionary immunity should be available. In many sewer backup claims there is an allegation of failure to properly inspect and/or maintain the system. Setting a sewer maintenance protocol as a policy level (e.g., city council) action probably brings discretionary immunity into play, so long as the prescribed timelines and procedures are met.

- Be sure the decision is made at the proper policy-setting level. Typically, this will be the council or commission level unless there has been a clear and demonstrable delegation of policy setting authority on certain matters to lower administrative levels. Most likely it

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[9] *Miller v Grants Pass Irrigation District*, 297 Or 312 (1984).
[10] *Morris v Oregon State Transportation Comm.*, 38 Or App 331 (1979), *Gallison v City of Portland*, 37 Or App 135 (1978), *Bakr v Elliott*, 125 Or App 1 (1993).
[11] *e.g., Tozer v City of Eugene*, 115 Or App 464 (1992), *Hughes v Wilson*, 345 Or 491 (2008).
[12] *Vokoun v Lake Oswego*, 335 Or 19 (2002).

[13] *Garrison v Deschutes County*, 334 Or, at 274.

will be up to staff to recognize these situations and take them to the appropriate policymaking level for consideration.

- Be sure the action is clearly documented, such as through a resolution, and that the documentation can be readily located to assist defense council in establishing the defense. It is important the documentation cover the decision maker's consideration of alternatives and/or competing interests, etc. It would be a good practice to keep copies of this type of documentation, along with any staff reports, recommendations, studies, etc. related to discretionary immunity matters in a separate file or binder for ready reference.

- Check with legal counsel if unsure about the applicability of discretionary immunity or the proper steps to establish this defense.

IV. CONCLUSION

You deserve a round of applause for reading all the way to the end of a chapter on law! Our goal here, though, is to set you up for success during your tenure as an elected official. Hopefully you now have a better understanding of what not to do, how to handle tricky situations the right way, know that you are protected as long as you act within the scope your position, and have an understanding of how to set your city up to defeat lawsuits by those who don't like the way you voted.

You do not need to be a master of any of this. Your city attorney, the LOC's small city direct legal program, and CIS' PreLoss legal program are all here to help you and your city succeed.