



RISK MANAGEMENT INFORMATION  
**LIABILITY CONSIDERATIONS IN BUDGET CUTBACKS**  
Preserving Discretionary Immunity

For many if not most cities, dealing with budget problems means cutting back – reducing some city services, possibly eliminating other services altogether, delaying or eliminating improvements, etc. In some cases, service cutbacks will increase the risk that accidents will occur, resulting in damage to members of the public. That in turn could mean more claims against the city for those damages. For example:

- Reducing the frequency of sewer maintenance and/or inspection may increase the risk of sewer back-ups.
- Delaying a sidewalk reconstruction project may increase the risk that someone will trip and fall because of a hole, crack, or irregularity in the sidewalk.
- Changing the standard for when the snowplows go out – say, from a 2” snowfall to a 4” snowfall – may increase the risk of traffic accidents.
- Reducing playground maintenance and inspection may increase the risk of injuries caused by hazards that might develop with playground equipment.
- Reducing police or fire staff may increase their response time in emergencies, potentially resulting in increased injuries or property damage.
- Eliminating or reducing the frequency of inspections of daycare facilities may increase the risk of injuries to children from abuse or negligence.

Minnesota courts and the statutes recognize that cities must sometimes make these kinds of very difficult decisions. They also recognize that these decisions should appropriately be made by the city officials, and not by the courts. And they recognize that if the city and city officials were to be held liable for damages resulting from these kinds of decisions, the courts and not the city officials would be the real decision-makers.

Discretionary immunity helps assure that these decisions on how best to use the city’s limited resources can and will be made by the city officials elected for that purpose – not by the courts in a lawsuit.

This material is provided as general information and is not a substitute for legal advice.  
Consult your attorney for advice concerning specific situations.

Discretionary immunity is an extremely important protection for the city. But to receive that protection from liability, it has to be clear to the courts that the city was in fact making a discretionary decision. As city officials make the very difficult but necessary decisions to deal with budget shortfalls, here are some things you can do to help assure that your city will be protected by discretionary immunity from potential liability.

### **Make These Decisions at the City Council Level**

In general, the higher the level at which the decision is made, the more likely it is that the courts will consider it to be discretionary. If an independent administrative board runs a particular operation – e.g., a utilities commission – the decisions would be made at that level.

### **Take all of the Relevant Social, Political, Economic, and Safety Considerations Into Account in Making These Budget Cutback Decisions**

Social factors might be considerations such as the need for people to be able to get to work whatever the weather conditions, the need for safe daycare facilities, and the desire for community playgrounds.

Economic considerations can include the city’s financial situation – e.g. the need to stay within debt or levy limits. Economic considerations also include the greater economic needs of the city, such as the need for good roads to support economic development, etc.

Political factors are largely a matter of the voters’, residents’, and businesses’ expectations and preferences for service levels. It could also include applicable standards or regulations, such as the NFPA’s advisory standard for fire staffing levels, or the building code requirements for what is required to be inspected and when, etc.

Safety factors are things like emergency response times; risks from street, sidewalk, park, or sewer hazards; etc.

### **Make Clear Records to Show That you Were Making Discretionary Decisions**

When you get to court, simply having made a discretionary decision isn’t enough. You also need to be able to show the court that the decision you made was in fact discretionary in nature. This means making and keeping good records that show that the council was considering and balancing these social, political, economic, and safety considerations. Those records could be in a variety of forms, such as:

- Council minutes that record the factors, arguments, and considerations that went into the council members’ decision, and not just the motions and votes.

#### **Definition**

*Discretionary immunity* means that the city and city officials cannot be held liable for the city’s discretionary decisions. A good working definition is that a discretionary decision is a *planning level decision* that involves a *balancing of social, political, economic, and safety considerations*.

- Supporting documentation such as staff memos to the council outlining and discussing the alternatives, and the costs, risks, and other pros and cons of each.
- Putting the council’s action in the form of a resolution with a series of “whereas” clauses identifying the social, political, economic, and safety considerations that went into the council’s decision.
- Audio or video recordings of the meetings at which the decisions were made.

The key is that when the liability claim comes that arguably stems from the decisions you’re making about where and how much to cut back – whether that claim happens this year or five years from now – you want to have the records available to show that the council was exercising its discretion in making these decisions.

**Your League Resource**

For additional information on how to preserve discretionary immunity in times of budget cutbacks, feel free to contact Pete Tritz, LMCIT Administrator at 651-281-1265 or [ptritz@lmc.org](mailto:ptritz@lmc.org).

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