

Marian Anderson

From: Legal Services Department <Legal_Services_Department@memun.org>
Sent: Tuesday, April 12, 2016 3:51 PM
To: townmanager@wiscasset.org
Subject: RE: Wiscasset - Legal Information Request - Fire Deapartments

Dear Ms. Anderson,

The major legal problem with allowing town employees to use the fire department resources (the truck, the fire house, town gasoline) for their own private use is that it is likely a violation of the public purpose doctrine. The Maine Constitution's "public purpose" clause provides that public funds cannot be used for a private purpose or for a private benefit (Opinion of the Justices, 560 A.2d 552 (Me. 1989)). If the town appropriates money for the fire department to purchase equipment, fuel and pay bills, then these must only be used for a public benefit. If the municipal officers are going to open the use of the fire house or fire department resources up to the public, such as to allow the public to wash cars or hold car washing fundraisers, it should develop a policy governing the use of the facilities. The following excerpts are from our *Municipal Officer's Manual*, which can be found online here using your MMA login information: <http://www.memun.org/MemberCenter/ManualCollection/MunicipalOfficers.aspx>.

AUTHORIZED EXPENDITURES (PUBLIC PURPOSE)

Municipalities may raise and appropriate money for any public purpose (*30-A M.R.S.A. § 5721*). A list of public purposes is set forth in §§ 5722-5728, and includes fire and police protection, sewer/water/power services, public works, schools and libraries, health and welfare, economic development, and celebrations. This list is not exclusive. Title 36 M.R.S.A. § 504 provides that if money raised by the legislative body is not for a legal purpose and is assessed with money legally raised, the tax assessment is not void. However, a court could order the municipality not to spend the money raised for the illegal purpose if the expenditure were challenged in court. (See court cases cited in MMA's *Municipal Roads Manual*.) A taxpayer might also have a right to recover a proportionate share of the illegal sum under § 504.

A good rule of thumb is that public money can only be spent on activities which benefit the public in general and which do not violate State or federal laws or Constitutions. The voters have no power to decide what is a public purpose: this can only be determined with finality by a court. As a practical matter, the municipal officers will have to make the initial decision whether something is a public purpose, so the board should be able to point out some public benefit connected with the proposed activity. Every case should be analyzed separately; there is no blanket answer.

TOWN-OWNED BUILDINGS

A town may own and operate several buildings, such as the town hall, garage, fire station, meeting place, and other facilities. The municipal officers must see to it that these buildings are adequately insured (see Chapter 10, "Insurance") against fire and other damage as well as for liability. Also, the municipal officers should keep track of the physical condition of the buildings so that repairs and maintenance can be done before small problems become large ones.

The municipal officers have further responsibilities for town-owned buildings that are available to private groups for receptions, meetings and the like. The municipal officers cannot make town buildings available for these purposes unless authorized to do so by an article or ordinance approved by the voters. In some towns there are no other buildings of sufficient size, so this use is allowed. In these situations, the municipal officers should:

- 1) Have a written policy on **smoking**—if allowed at all and if so, where (22 M.R.S.A. §§ 1541, 5142).
- 2) Have a written policy concerning **alcoholic beverages**—if allowed, the group should sign an indemnification agreement and carry insurance so the town will not be held liable. (See “Liability Waivers,” “Legal Notes.” *Maine Townsman*, November, 1999) regarding the use of signed release of indemnification forms as a way to protect the town.
- 3) Charge a **fee for use** of the building, if authorized by the voters, which will cover the town’s expenses (lights, cleaning, heat, etc.); otherwise there may be a problem with the “public purpose” doctrine (see Chapter 8, “Disbursements, Public Purpose”).
- 4) Issue a **written permit** showing the allowed date and time of the event, and the maximum number of people allowed in the building.
- 5) Put in **writing any other conditions or restrictions** on the use of the building for private groups. One such condition may be the presence of a police officer at a public dance pursuant to 8 M.R.S.A. § 161.
- 6) Make sure that the **town’s liability insurance** covers such use of the building, or if not, require the group to provide insurance, naming the town and its officers, employees and agents as additional named insureds, and obtain evidence (certificate of insurance) that it has been done.

When adopting a policy on fees charged, insurance required, and other terms for or use of a public building, it is legal to distinguish between use by a nonprofit organization or community club, like the Scouts or the Lions Club, and a commercial use of the building for profit or private functions which would otherwise be renting commercial facilities, such as a wedding reception or family party. This is because it is legal to support nonprofit organizations and community organizations directly by making a cash donation, so it can be done indirectly by charging no fee or a reduced fee or requiring no additional insurance. It also is legal to make a distinction between use by residents and taxpayers vs. nonresidents who aren’t taxpayers when establishing a fee schedule.

The municipal officers will need to discuss the specific terms of the town’s liability coverage with the town’s insurer. If the town is insured by MMA, then you will need to talk to Risk Pool directly. Legal Services is a separate department and in order to prevent any conflict of interests we do not have access to your insurance information. If you have any general questions about liability after talking with the town’s insurer, please do not hesitate to follow up with me.

Finally, we discuss fire department finances in our “Fire Protection” Information Packet, which can be found online here: <http://www.memun.org/MemberCenter/InfoPacketsGuides/FireProtection.aspx>. You will need your MMA login information to access this link. The following excerpt from the packet clarifies the proper procedure for handling donations to the fire department.

A municipal fire department may not maintain and control its own bank accounts. All money appropriated for its budget by the legislative body must be invested and disbursed in accordance with the laws governing all municipal funds. Municipal fire departments may not accept gifts of property without approval of the legislative body or gifts of money without the approval of the municipal officers. (see 30-A M.R.S.A. § 5652 - § 5655). If a municipal fire department conducts its own fundraising efforts, such as selling tickets to a bean supper or selling raffle tickets, any money generated constitutes municipal money and must be deposited with the municipal treasurer and appropriated by the legislative body before the fire department may legally spend it. If a separate "auxiliary" committee conducts this type of fundraiser, the money may not be used by the fire department unless it is accepted by the municipal officers under 30-A M.R.S.A. § 5652 as a supplement to the fire department's existing budget as approved by the legislative body.

I hope this is helpful.

Best,

Marian Anderson

From: Marian L Anderson <townmanager@wiscasset.org>
Sent: Friday, April 15, 2016 12:50 PM
To: tjmerry83@gmail.com
Subject: FW: Wiscasset's Town Liability
Attachments: Risk Manager Q&A - Spring 2003.pdf

TJ,

Here is the response from the Town's insurance carrier regarding the issues we have been discussing.

Marian L. Anderson, Town Manager

Town of Wiscasset
51 Bath Road
Wiscasset, Maine 04578-4108
207-882-8200 x 108

From: Michelle Pelletier [mailto:mpelletier@memun.org]
Sent: Wednesday, April 13, 2016 11:03 AM
To: Marian L Anderson
Subject: RE: Wiscasset's Town Liability

Marian,

Private use of public property should be a concern for all municipalities. It could lead to both Property and Liability claims as well as potential Workers compensation claims for the municipality. Keep in mind that employees are only compensable under Workers Compensation if the work is within course and scope of their employment. Permitting private use of publicly owned facilities, equipment and tools by employees or volunteers while on or off duty, raises concerns. There are significant liability exposures for the municipality if an employee, volunteer or member of the public is injured while using publicly owned tools or equipment for private purposes. If a town owned facility or equipment is damaged as a result, the municipality's insurance provider will likely pursue recovery for the damage from the responsible party. Tools and equipment can be damaged, lost or stolen.

The Maine Municipal Association Property & Casualty Pool recommends that all municipalities establish written policies restricting the use of municipally owned facilities, equipment and tools. Employees should be made aware of the potential exposures that may result from their private use of town owned property. There may be other legal implications as well and we recommend you contact the legal department on the legality of using public funds for private purposes.

As a member of the MMA Risk Management programs, your town has already made a commitment to good risk management practices. I have also attached a copy of a prior Risk Manager article on this very subject. Please contact me if you have any additional questions.

Michelle Pelletier, CPCU, AU
Underwriting Manager
Risk Management Services

PRIVATE USE OF PUBLIC PROPERTY



Question: We have a facility full of tools and equipment that employees don't have at home. Why not let employees use them? It would create good will and what harm can it do?

Answer: It could lead to property, liability and workers compensation claims for the public entity.

Permitting publicly owned facilities, equipment, and tools to be used by employees, either on or off duty, raises a number of concerns. Tools and equipment can be damaged, lost, or stolen. Building security can be compromised. The likelihood of property damage or fire loss increases as accountability decreases. The damage may not be limited to the property of the employer but may also impact neighboring properties. If an off duty employee, volunteer, or member of the public is injured while using publicly owned tools or equipment, there are significant exposures for the public entity in the area of liability and possible workers compensation claims. If a facility is damaged, destroyed, or equipment is lost as a result of off duty employee or non-employee actions, the entity's insurance provider will likely pursue recovery for the damage from the responsible party.

Serious problems can also arise if a public entity provides services for some citizens that exceed what is normally provided to all citizens. Examples of this include towing of privately owned vehicles with a town owned truck, cleaning of residential chimneys by the fire department, and the "jimmying" of a locked vehicle door in a non-emergency situation. Even with the best of intentions it is important to understand the exposures if a vehicle is damaged while towing, a roof or chimney is damaged while cleaning, or if a window is broken or electronic door locking system is damaged while unlocking a vehicle door. The public entity as well as the person or persons involved could become liable for damages or bodily injury.



It is in the best interest of all public entities to establish written policies restricting the use of publicly owned facilities, equipment, and tools. Such policies should define services that will not be provided. Employees should be made aware of the potential exposures that may result from "the right thing, gone wrong". In most cases, a sound policy, coupled with good common sense, is the best protection a public entity can have.

