

# ACM, BURLCO and TRICO Municipal Joint Insurance Funds



## Land Use Liability

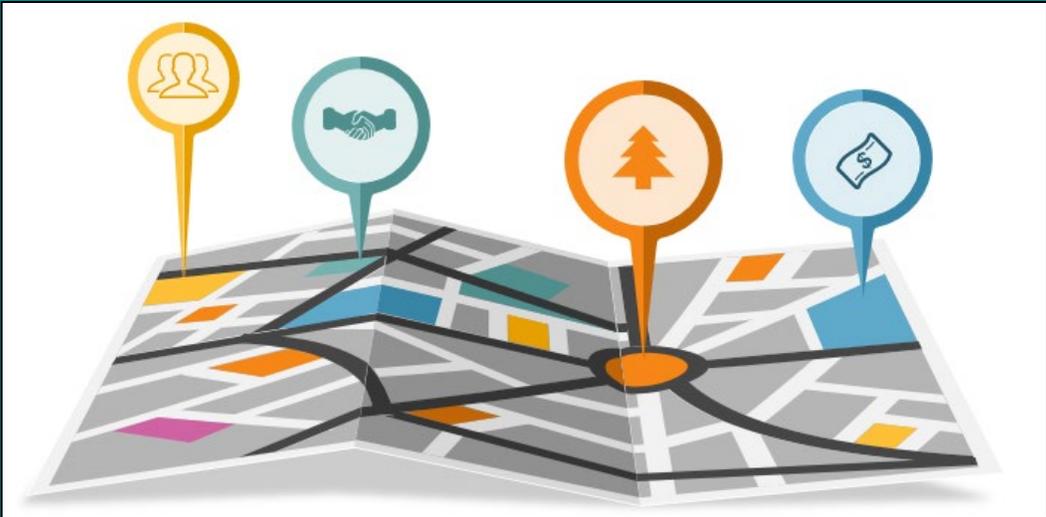
Training Booklet for Land Use Board Members







This booklet is part of a program to acquaint local officials with Risk Management principles associated with Land Use Liability. It is designed to provide a general understanding of the legal principles pertaining to governmental operations. It is highly recommended that local officials seek the advice of their attorney to evaluate any particular case or circumstance.



**FOR MORE INFORMATION OR QUESTIONS, CONTACT:**

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# Land Use Liability

## Introduction

The basic principle of land use law is that no person has the right to use property in a fashion that threatens public safety or is so obnoxious that it materially impairs the rights of adjacent property owners. However, government does not have the right to adopt regulations that effectively prohibit all reasonable use of private property. Striking the right balance between these two sometimes contradictory legal tenants can be the difference between sensible well thought out land development and lengthy expensive litigation.

Delays in winning approvals are a normal part of the land use process and usually do not give rise to liability suits. The appeal of a denied application is to the Superior Court for injunctive relief, which is a court order that requires the municipality to take action or prohibits the municipality from taking action.

- **Land use is a quasi-judicial function and has the same broad immunities afforded to a court. (i.e. a Judge or Prosecutor)**
- **Land use disputes rarely become liability claims against municipalities because of the broad immunities extended to governmental decision makers.**
- **In fact, individual members of land use boards have the same protections from lawsuits as judges.**
- **However, these immunities do not apply when a land use board violates an applicant's civil rights.**
- **In these situations, monetary damages can be awarded to the applicant including legal fees.**



Land use suits are expensive to defend because of the attorney “fee-shifting” component in the law. If you lose a normal liability case, you pay the plaintiff and you pay your attorney’s bills. In a “fee shifting” case, you pay the plaintiff, you pay your attorney, AND you pay the plaintiff’s attorney. Further, the plaintiff’s attorney is not paid a percentage of the award, but rather a fee based on the number of hours spent on the case PLUS an additional amount to compensate the attorney for the risk of losing the case. As a result, plaintiff’s attorneys often build up the

number of hours if they believe they have a good chance of winning. It is not usual for the plaintiff’s attorney to be awarded an amount far higher than the award to the plaintiff.

# Real Life Lessons

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## Case 1: Board Member Immunity

It is common for the town to be held liable even when the board members are personally immune. For example, in one case an experienced developer received a Superior Court order instructing the town to approve a project after considerable delay. The planning board willfully ignored the court ruling and rejected the application anyway. The developer sued both the town and members of the planning board personally. While the town agreed to a substantial settlement, the developer refused to settle the case against the board members.

### **RESULT**

The jury found three members personally liable, awarding damages of \$5,000 against each. But on appeal, the Appellate Court ruled that these board members were immune from personal liability even in this rare instance, because the members firmly believed they were making the right decision.

### **HOWEVER....**

This immunity can be nullified in cases where the board member has a conflict or is acting in self-interest. In another case, a religious institution applied for variances to build a school in a residential zone. A board member lived in a nearby development and coached her neighbors on what questions they should ask at the hearing. She did not recuse herself from the deliberations. As a result of this behavior, the court ruled that she was not entitled to personal immunity.

## Case 2: Conflicts of Interest and Safe Harbor

Conflicts of interest can be tricky and every land use board member should complete a course on the NJ Local Official's Ethics Act. Fortunately, the law includes a safe harbor defense under most circumstances if you are acting upon and with the advice of an attorney.

### **TO BE ELIGIBLE FOR THE SAFE HARBOR DEFENSE:**

- **The advice must be received prior to your action and the individual who offered the advice possessed authority or responsibility with regard to ethical issues.**
  - This is normally the municipal attorney or the board attorney.
  - Simply relying on your personal attorney or a friend is not sufficient.
- **Further, the individual seeking the advice is required to make full disclosure of all pertinent facts and circumstance prior to taking action, and the individual must comply with the advice, including all the restrictions.**

## Case 3: Inverse Condemnation Cases

Under the 5<sup>th</sup> Amendment to the Federal Constitution, government must compensate a property owner if regulations become so prohibitive that it constitutes a de facto taking. Inverse Condemnation cases can be complicated and expensive to litigate. In 2006, the New Jersey Supreme Court ruled that in deciding inverse condemnation cases, courts must ask if the regulation effectively eliminates all economically productive use of the land. After answering this question, the courts must go further and determine if the regulation unduly interferes with legitimate investment-backed expectations of the property owner depending on various factors.

### **RESULT**

In the case decided by the Supreme Court, the owner of an otherwise conforming lot in a single family zone was prevented from starting construction by the NJ DEP because of flood plain regulations. The DEP decided that the property can only be used for open space, parkland or a parking lot. The court ruled that this went too far and was really a governmental taking of private property.

## Case 4: Religious Cases

There has been extensive litigation in recent years under the Religious Land Use and Institutionalized Persons Act, known as “RLUIPA.” Unanimously adopted by Congress in 2000, this act provides that “no government shall impose land use regulation that creates a substantial burden on religious exercise unless in furtherance of a compelling governmental interest that is the least restrictive way of accomplishing that objective.” These applications can be controversial. And if not handled properly, will not only result in litigation but the U.S. Attorney’s Office along with their own planners will get involved.

In a recent case, a Muslim congregation proposed to build a conforming mosque and educational center on a site of a former hotel. Within two months, the Council adopted a revised zoning ordinance that required a church to seek a conditional use variance if it proposed to be located in a residential zone. The town argued that the area in question had winding roads and there were other properties where the mosque could locate, although these properties were substantially more expensive. The mosque argued that its consultant found that traffic would not be a problem and that the area already had educational and other similar uses.

### **RESULT**

The Federal court was swayed by how quickly the council moved to change the zone. As a result of the decision, the town paid \$2.5 million to purchase another property for the mosque and the township’s insurer paid the mosque’s legal bills that amounted to \$5 million.



## Case 5: Adult Bookstores and Movie Theaters

Under the first amendment, government cannot regulate the content of speech, but under some circumstances can regulate the side effects. In one case, the U.S. Supreme Court overturned a zoning ordinance that prohibited adult book stores and theaters because the zoning ordinance allowed a broad range of other uses in its commercial zone. Therefore, the court decided that this ordinance singled out a particular type of speech.

### **HOWEVER....**

Just a few years later, the same court upheld a zoning ordinance that prohibited adult theaters within 1000 feet of a residential zone. In this case, the court ruled that municipalities can take into consideration the higher crime rate around these establishments and use the zoning code to establish a buffer from residential areas so long as there are still places within the municipality where these establishments can locate.

***Municipalities must be careful before adopting any zoning or building regulation that has the effect of controlling speech.***

## Case 6: Selective Enforcement

While all law enforcement is inherently selective, it is illegal to make that selection based on criteria that amounts to illegal discrimination. For example, a group of Orthodox Jewish residents attempted to create an enclosed "Eruv" zone so that they could push or carry objects outside their homes on the Sabbath. Eruv's were originally built with ropes and wooden poles, but today an Eruv can be established by running plastic string between utility poles. Where this has been done, the string is high and out of sight. The utility company agreed but after bitter controversy, the town decided to stop the plan by enforcing its 1954 ordinance that prohibits placing signs and the like on utility poles, fences, and other public places.

### **RESULT**

The court ruled against the town on the grounds that the town's action constituted selective enforcement. The court found that officials ignored numerous other violations for years, such as signs for yard sales, lost animals, house numbers, directional signs to churches, and the like.

# Other Helpful Information

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## Land Use Board Meeting Conduct

One common problem with controversial cases is that the hearings are often extremely disruptive and prejudice the rights of the applicant. In *White v City of Norwalk* a Federal Court held that: “In dealing with agenda items, the Council does not violate the first amendment when it restricts speakers to the subject at hand. While speakers cannot be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.” One of the important factors in this case is that the town established reasonable decorum rules by ordinance and consistently enforced these standards.



### **MAKE NOTE:**

Establish the rules at the beginning of the year at the reorganization meeting.

- Under New Jersey Law, boards (but not the Governing Body) can limit comment to issues that are relevant to what the board may consider in reaching its decisions.
- The board can also insist on decorum.
- However, boards may not appear to be singling out an individual.
- Follow the advice of your board attorney.

# Other Helpful Information

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## Meeting with Applicants

Board members must be careful about non-public meetings with applicants. The courts recognize that board members need to visit proposed development sites, but caution board members not go beyond the arguments and allegations advanced during the board's meetings.

- **Further, the courts have emphasized that the knowledge gained from the visit should be placed on the record.**
- **For this reason, it is good practice to have the board attorney at site meetings and announce the date and time of the visit.**
- **Never meet with an applicant alone.**



## Indemnification of Land Use Board Members

New Jersey law allows towns to defend and indemnify their officials and employees for claims that arise from the performance of their official functions. This can even include punitive damages and defense costs from criminal proceedings under some circumstances. The Governing Body's authority is broad.

However, there is no legal requirement that the Governing Body exercise this authority. This uncertainty can be avoided if the town adopts an indemnification ordinance. Most towns have these ordinances and they should be reviewed by the Land Use Board attorney in conjunction with the Governing Body's attorney.

# Final Thoughts

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Create an environment where your staff and attorney are encouraged to tell you what you should hear, and not necessarily what you or the public wants to hear.

- **If there is litigation, be guided by the attorney representing you.**
- **Do not meet with applicants or opponents to an application alone.**
- **Avoid saying anything that can be construed as bias, both at meetings and elsewhere.**
  - **Example: in one case a board member said at a contentious hearing: “We are not going to do anything that is contrary to the wishes of the public.”**
  - **Comments like that make it very difficult to defend the board in court.**



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