

DISCRETIONARY FUNCTION IMMUNITY

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UTAH CODE

The Utah Governmental Immunity Act waives immunity from suit against governmental entities for injuries proximately caused by a negligent act or omission of an employee committed within the scope of employment, except under certain enumerated exceptions.

UTAH CODE § 63G-7-301(2)(I)

One of those exceptions, the discretionary function exception, retains governmental immunity if the injury “arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.”

UTAH CODE § 63G-7-301(2)(I)



UTAH COURTS

Utah Courts have ruled that discretionary function immunity was intended to shield governmental acts and decisions that impact large numbers of people for which the threat of litigation would make public administration nearly impossible. However, there is a balancing that takes place because almost every action of a government employee involves some degree of discretion. Therefore, Utah courts have narrowly construed the exception to exclude operational decisions.

Whether a decision is merely operational or falls within the protections of discretionary function immunity is a fact-intensive inquiry. Decisions that do not require the exercise of policy evaluation, judgment, and expertise are operational and not protected. By the same token, decisions that merely implement policy-founded decisions do not qualify for discretionary function immunity.

Utah courts have further explained that decisions that involve geological, environmental, financial, and urban planning and developmental concerns and require policy evaluation, judgment, and expertise to determine whether and what changes or improvements should be made at public expense are the kinds of decisions that qualify for discretionary function immunity.

OPERATIONAL VS. DISCRETIONARY

THE FOLLOWING HAVE BEEN HELD OR SUGGESTED TO BE MERELY OPERATIONAL DECISIONS:

- Installing dirt berms instead of signs at a curve in the highway
- Treatment decisions made by a physician
- Placing a child in a *particular* foster home
- Selling an impounded motorcycle
- Dredging a particular stretch of a creek to assist with runoff water management
- Failing to monitor an individual on probation
- Placement of a traffic control signal
- The decision to use barrels rather than concrete barriers as part of a road maintenance project
- Prioritization and method of routine sidewalk maintenance and repair
- Fence repair

THE FOLLOWING HAVE BEEN HELD OR SUGGESTED TO BE DISCRETIONARY DECISIONS:

- The design, capacity, and construction of flood control systems
- The placement of safety devices at certain railroad crossings and not others
- The adoption of an ordinance requiring waitresses to submit to annual tuberculosis screenings
- The issuance of a permit allowing a waitress to work
- The creation of a work release prison program
- Determining whether a particular prisoner has displayed the aptitude, character, and likelihood of rehabilitation sufficient to qualify for a work release prison program
- Determining whether a child should be placed into foster care
- A city's decision not to bury power lines at airport, where city had specifically sought a quote to bury the power lines but determined the amount was outside the airport's budget
- Granting probation to an incarcerated individual
- Whether or not to embark on a particular road maintenance project
- UDOT's decision not to install a concrete barrier that would need to be entirely replaced when the road was resurfaced in a few years, given the high expense of the project and the significant disruption of canyon traffic
- The height of power lines and insulation used, on a city-wide basis

GOVERNMENT ENTITIES

Note that, in general, the trend is that older cases were more likely to find discretionary function immunity than more recent decisions.

If a governmental entity wishes to have a decision protected by discretionary function immunity, the following considerations may be helpful. None of these alone will be enough to transform a fundamentally operational decision into a discretionary one, but they may make a difference in close cases. Because cases turn on evidence, this guidance also includes documents that may be generated and retained in order to bolster a governmental entity's claim to immunity.

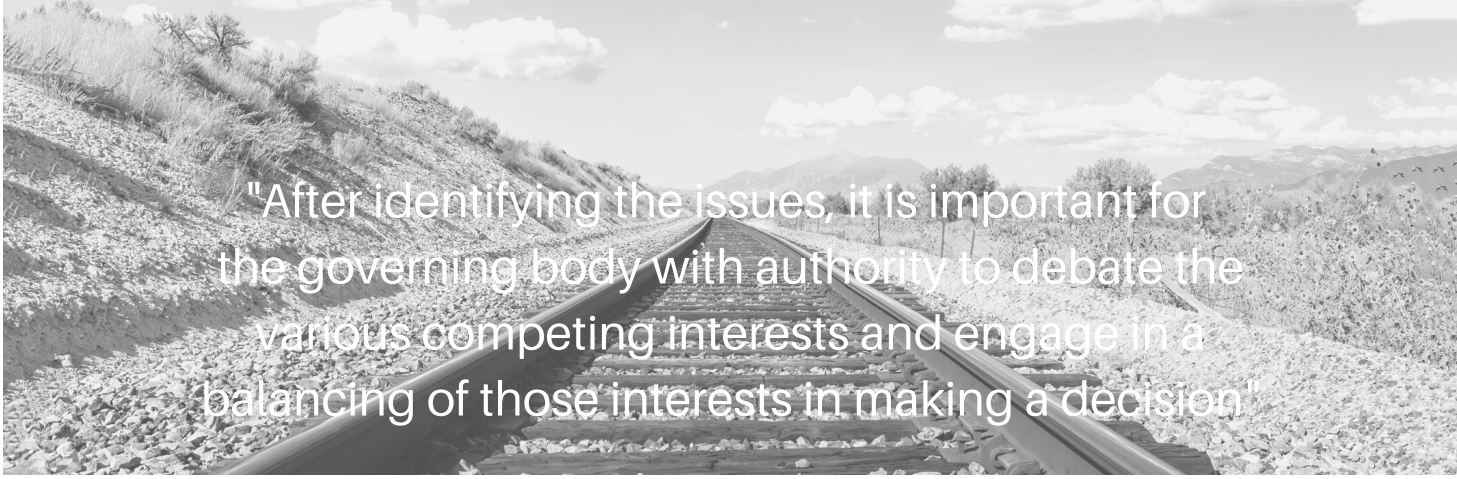
FIRST,

to the extent possible, the decisions should be made by an elected official rather than a hired employee. Although this is not determinative, elected officials are generally assumed to be acting in accordance with broader policy considerations. Thus, a department head who is aware that numerous repairs are needed to alleviate potentially dangerous conditions may want to expressly include a request for all of the repairs in her budgetary proposal, with a proposed budget for highest priority areas, even if she knows that it will not be possible for her municipality to fund all of the repairs during the next fiscal year.

For purposes of showing that the decisions were made by elected officials, the primary documentary evidence would be meeting minutes, including records that were submitted as part of those meetings. Other documents might include an elected official's written notes and files, as well as correspondence showing that the elected official was aware of and participated in the decision-making process, including emails between government employees and the elected officials.

SECOND,

the governmental entity should be able to show that it consciously and carefully engaged in balancing risks and advantages. In one case, the court, which ruled discretionary function immunity applied, relied heavily on the governmental entity's comprehensive study, analysis, and department debate to determine not to install a median barrier. This balancing should be documented at the time the decision is being made. Such documents might include meeting minutes that are sufficiently detailed to reflect discussion or debate, budgetary spreadsheets assigning priority to different projects, materials considered as part of the decision making (including reports or citizen comments), and written correspondence showing debate. In many instances it may be worth following up on a spirited department meeting with an email summarizing the points of contention, evidence considered, and decision reached.



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THIRD,

the decision should be guided by experts, where possible. And it is critical to document the processes followed and factors considered as part of the expert evaluations. For example, in assessing the relative dangerousness of railroad crossing in Utah, documentation of the crossing's physical characteristics and configurations, the volume and type of vehicular and train traffic, and other relevant factors should be identified. In addition to formal reports and studies by the experts, documents that show consultation with the experts occurred and were considered might include council minutes, emails to employees, and notes of consultations.

In addition to practical considerations that might weigh against escalation, it is also important to keep in mind that in order for immunity to apply the decision must be made by an individual, body, or agency with the requisite authority and duty to do or make the challenged act, omission, or decision.

Steps to building good discretionary immunity defense start with the governing body identifying projects and issues that involve geological, environmental, financial, and urban planning and developmental concerns and require policy evaluation, judgment, and/or expertise to determine whether changes or improvements should be made at public expense.

After identifying the issues, it is important for the governing body with authority to debate the various competing interests and engage in a balancing of those interests in making a decision. It is further helpful to have expert input on each of the issues, as they are weighed. Finally, it is critical to document that the balancing exercise occurred with the items identified above.

PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS ABOUT THE UTAH GOVERNMENTAL IMMUNITY ACT, INCLUDING THE DISCRETIONARY FUNCTION IMMUNITY EXCEPTION. SNOW CHRISTENSEN & MARTINEAU IS WELL-VERSED IN AIDING MUNICIPALITIES AS THEY NAVIGATE AND ASSERT IMMUNITY DEFENSES OF ALL KINDS.