

When is it permissible for a town to act as a commercial entity and provide services or sell materials?

The short answer is “almost never.” The long answer involves two legal precepts.

First, municipalities are creatures of the state and have only those powers expressly granted by the state or such implied powers as may be incidentally related. Towns clearly have no express power to operate as a business in competition with private enterprise.

This was addressed in *Hinesburg Sand & Gravel v. Town of Hinesburg*, 135 Vt. 484 (1977). In that case, the town was operating a gravel pit and using 10-16 % of the gravel for its roads and selling the rest. The court held that this was not an incidental sale of gravel and that “no amount of good faith rationalization can gloss over the fact that the principle activity ... is a private business operation by the Town, in direct competition with [private enterprise].” *Id.* at 486. [Internal quote omitted]. Selling most of the gravel “in tax-free competition” was a mere pretext and was illegal.

The second important consideration is that of liability. When a municipality is performing a governmental function (e.g. maintaining highways, collecting taxes) it is covered by sovereign immunity and is protected from lawsuits for negligence. However, when it steps out of its governmental role and acts in a private or proprietary capacity it may be held liable in the same manner as a private corporation would when performing the same tasks. So, when a town enters into the business of plowing private driveways or buying goods tax-free or at state contract prices and then selling them in competition with private businesses, it may be sued for damages. (For a more detailed analysis of sovereign immunity and its exceptions see the *VLCT Handbook for Vermont Selectboards*, 1999, Chapter XVII.)

There will always be occasions where towns need to help each other out by sharing or lending a hand. But, anything that smacks of competition with private business, especially where the town has the financial advantage of operating on a tax-free basis, will be highly suspect and may cost all parties dearly in the long run.

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