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PRIVILEGED AND CONFIDENTIAL

Melinda Reith
Clerk/CAO
United Townships of Head, Clara, and Maria
15 Township Hall Road
Stonecliffe, ON K0J 2K0

Dear Ms. Reith:

RE: Provision of Automobile Extrication Services
Our File No: 29822-4

You requested our opinion as to whether the United Townships of Head, Clara, and Maria (the "Township") is required by law to provide automobile extrication services to its residents, and whether the failure to provide such services could result in liability on behalf of the Township.

As we understand the current situation, the Township had an agreement with neighbouring municipalities to provide auto extrication services along Trans-Canada Highway 17. However, at the end of last year the agreement ended and was not renewed due to difficulties experienced by these neighbouring municipalities in providing fire services to their own residents. The Township has never had a fire department, and therefore does not have the capacity to provide this type of service.

Auto extrication services constitute a component of "fire protection services" under the *Fire Protection and Prevention Act, 1997, SO 1997, c 4* (the "FPPA").

Specifically, section 2(1) of the *FPPA* provides as follows:

- 2(1) Every municipality shall,
(a) establish a program in the municipality which must include public education with respect to fire safety and certain components of fire prevention; and

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(b) provide other fire protection services as it determines may be necessary in accordance with its needs and circumstances.

Section 1 of the *FPPA* defines “fire protection services” as including the following:

- (a) fire suppression, fire prevention and fire safety education
- (b) mitigation and prevention of the risk created by the presence of unsafe levels of carbon monoxide and safety education related to the presence of those levels;
- (c) rescue and emergency services**
- (d) communication in respect of anything described in clauses (a) to (c)
- (e) training of persons involved in providing anything described in clauses (a) to (d), and
- (f) the delivery of any service described in clauses (a) to (e).

As auto extrication services are a form of rescue and emergency services, they therefore fall under the definition of “fire protection services” and a municipality has discretion as to whether or to what extent it will provide such services.

As auto extrication is not a mandatory service, whether the Township provides that service is a policy decision. The case law establishes a distinction with respect to policy decisions and operational decisions made by a municipality. Policy decisions are those which involve or are dictated by financial, economic, social, or political factors or constraints, whereas operational decisions are actions that implement the policy, or are merely the product of administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness.¹

Section 2(1)(b) of the *FPPA* gives municipalities a very broad discretion when deciding whether to provide such services, allowing them to consider a range of factors which could include financial, economic, social, or political issues/constraints. Therefore, such a decision is one of policy rather than one that falls within the operational sphere.

The Supreme Court has held that generally, a municipality cannot be held liable in the creation of policy when exercising a discretionary power. In *Laurentide Motels v Beauport (Ville)*, [1989] 1 SCR 705, the Court provided:

The only duty incumbent upon the authority in the policy sphere is to make its decisions responsibly and in accordance with the object of the Act which conferred the power. However, the discretion conferred by the legislator is not so broad so as to exclude all liability for the authority’s actions. Once the authority moves into the operational sphere of its power, i.e. the practical execution of its policy decision, the authority will be liable for damage caused to an individual by its negligence.

¹ *Just v British Columbia*, [1989] 2 SCR 1228 at 705-706.

Similarly, in *Just v British Columbia*, [1989] 2 SCR 1228, the Court stated:

The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions upon social, political, or economic factors. However, the implementation of such decisions may well be subject to claims in tort.

As well, section 450 of the *Municipal Act, 2001*, SO 2001, c 25 provides a municipality, member of a municipal council, or an officer, employee or agent of a municipality with immunity from liability incurred as a result of good faith policy decisions. Section 450 states:

No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against:

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or a local board.

Therefore, as the decision about whether to provide automotive extrication services is one of policy, liability cannot be imposed upon the Township for its decision not to provide such services, if the policy is made validly.

The Township must consider other case law, which holds that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion, or that it was so irrational or unreasonable that it constitutes an improper exercise of governmental discretion.² The Township should keep this principle in mind when deciding on whether to provide automobile extrication services. The Township should ensure that it records and is able to provide some form of reasonable justification for the policy; whether it be economic, social, financial, or political. Provided the Township considers whether or not to provide the services, and decides not to provide the services due to financial or other valid considerations, the policy should be immune from liability. Not considering the issue deliberately is not a valid policy basis and failure to provide the service through simple inaction will not have the protection of section 450.

It is also important to note that the *FPPA* provides a system of review of the policy decisions made by a municipality to protect against potential decisions that may result in a serious threat to public safety. Sections 2(7) to 2(10) establish a process whereby the Fire Marshal can review

² *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 2 SCR 1228; *Oosthoek v Thunder Bay (City)*, [1994] OJ No 2619 (Ont Ct Jus (Gen Div)).

the policy decisions of a municipality and, if the Fire Marshal deems that such decisions have created a serious threat to public safety, make recommendations to council. If those recommendations are not followed, the Minister may recommend that a regulation be imposed requiring the municipality to comply.

Overall, it is our opinion that the Township will not incur any liability as a result of a legitimate policy decision to refrain from providing automobile extrication services, as long as the Township is able to provide reasonable justification for making such a decision.

We trust that this opinion will be of assistance. Should you have any questions about the above or wish to discuss any aspect of this opinion please contact me.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

A handwritten signature in black ink, appearing to read 'Tony Fleming', with a long horizontal flourish extending to the right.

Tony Fleming

TEF:rjg