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MEMORANDUM OF LAW

DATE: July 13, 2010

TO: Javier Mainar, San Diego City Fire-Rescue Department Chief

FROM: San Diego City Attorney's Office

SUBJECT: Fire Apparatus Access Roadways

INTRODUCTION

On May 10, 2009, the City of San Diego, Streets Division painted a red stripe on the north side of a narrow section of Vista de la Playa in La Jolla. The narrow section of Vista de la Playa is an approximate one-hundred foot long "bottleneck" and begins at the intersection of Monte Vista Avenue. It is the only means of emergency roadway vehicle access for the homes located on that road. Vista de la Playa is an older road, built before modern fire codes were adopted by the City. Due to changes in fire fighting apparatus access requirements over the decades, many older roads do not comply with current fire code requirements.

QUESTIONS PRESENTED

1. What California Fire Code (CFC) sections apply to fire apparatus access roads in San Diego?

2. May the CFC sections governing fire apparatus access roads be applied retroactively?

3. What is the City's liability with respect to fire-rescue services and fire-rescue apparatus access requirements?

SHORT ANSWERS

1. CFC section 503 defines and describes current laws on fire apparatus aecess roads.

2. Laws concerning fire apparatus access roads may be applied retroactively, at the discretion of the San Diego Fire-Rescue Department (Department).

3. The Government Tort Claims Act gives the City broad immunity for fire-rescue services with limited exceptions.

ANALYSIS

I. CURRENT SAN DIEGO LAW REGARDING FIRE APPARATUS ACCESS ROADWAYS.

The current San Diego Fire Code (SDFC) adopts the 2007 CFC.[1] The CFC is additionally implemented through a series of Department policies, prepared by the Department's Fire Prevention Bureau.

A. The CFC and General Fire Code Background

The CFC is a part of Title 24 of the California Code of Regulations, also known as the California Building Standards Code. The CFC is promulgated by the California Building Standards Commission and is based on the 2006 International Fire Code. The City adopted most of the 2007 CFC in April of 2008. *See* San Diego Municipal Code § 55.0101.[2] The City's amendments to the 2007 CFC requirements are included in the San Diego Municipal Code (SDMC) and are part of the SDFC.

Historically, the City adopts a fire code, based on a model code, every few years.[3] The first adoption of a model fire code was in 1967. *See* San Diego Ordinance O-9651 (Jun. 20, 1967). Several current Department policies refer to the date of February 9, 1975, the adoption date of the 1973 Uniform Fire Code by the City. *See* San Diego Ordinance O-11474 (Jan. 9, 1975).

The sections of the 2007 CFC that govern Fire Apparatus Access Roadways (FAAR) are section 503 and Appendix D. The City did not adopt Appendix D of the 2007 CFC.[4]

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[1] The SDFC includes those parts of the CFC specifically codified within the SDMC. SDMC § 55.0101(b)(1). SDFC sections that mirror CFC sections will be cited as CFC sections as suggested by SDMC section 55.0101(c).

[2] Cities are required to enforce the California Building Standards Code. *See* Cal. Health & Safety Code §§ 17958, 17960, 18938(b), 18941, 18945, and 18948. The City may amend the CFC, but the City's changes must be "more restrictive" than the CFC itself. CFC § 101.8.

[3] A model fire code is meant to help government entities enact fire safety regulations using the experience of the fire and building construction experts who make up the model code drafting committees. *See generally* International Code Council (visited June 22, 2010), website http://www.iccsafe.org/cs/codes/Pages/default.aspx.

[4] The subtitle to Appendix D states that its adoption is "not mandatory." CFC Appendix D.

B. The Current CFC and FAAR's

The City adopted most of the 2007 CFC in 2008. SDMC § 55.0101. This included CFC sections 502 and 503, titled "Definitions" and "Fire Apparatus Access Roads" respectively. SDMC§ 55.0501.

CFC sections 502 and 503 explain what a FAAR is and when it is needed. A FAAR is a road that provides access for a fire-fighting apparatus to reach a building or structure. CFC § 502.1. It includes public and private streets, as well as fire lanes. *Id.* CFC section 503 says FAAR's "shall be provided for every facility, building, or portion of a building hereafter constructed or moved into or within the jurisdiction." CFC § 503.1.1. Generally, FAAR's are required to extend within 150 feet of all portions of the first floor exterior of a building. CFC § 503.1.1. These roads are also required to have an unobstructed twenty-foot width, and a vertical clearance of 13 feet 6 inches. CFC § 503.2.1. CFC section 503 also describes requirements such as markings, security gates, and requirements for fire apparatus turning radiuses. *See generally* CFC § 503. No SDMC amendments significantly changed section 503 of the 2007 CFC.

C. Fire Prevention Bureau Policies

The drafters of the model International Fire Code recommend local governments establish policies to ensure the equal application of restrictions and to "avoid the possibility of charges of selective enforcement." 2006 International Fire Code Commentary, p. 1-8. The Department, via the Fire Prevention Bureau, has implemented a series of policies to clarify its implementation of the CFC regarding FAAR's. There is a policy for private roads and a policy for public roads.

The policy addressing the City's position on public streets is Policy A-08-10, "Fire Apparatus Access Road for Existing Public Streets CFC section 503." Fire Prevention Bureau (2008). This policy "outlines the procedures for requiring fire access roadways for public streets built before February 9, 1975." *Id.* § I. Policy A-08-10 states "[t]he fire code official may require that an access roadway be established if a distinct hazard to life or property exists," and that the determination to retroactively apply the CFC will be made "on a case-by-case basis with the ability to conduct fire fighting operations as the primary consideration." *Id.* §§ III and IV. This policy also states that Policy "A-08-01 [sic]," titled "Fire Access Roadways," covers pre-existing private streets (per the Department, policy number A-08-01 referenced in section II of Policy A-08-10 is a typo and should read "A-08-1").

The second policy, numbered Policy A-08-1, is entitled "Fire Access Roadways CFC Section 503." This policy addresses the Department's "fire apparatus access roadway requirements as outlined in CFC section 503." *Id.* § I. The policy applies to both public and private streets. *Id.* § II. It requires a twenty-foot unobstructed roadway that can reach all areas of a building's first floor within 150 feet. *Id.* § III. There is an exception for buildings on pre-existing private roadways subject to consideration of the Department's "ability to conduct fire

fighting operations" on that roadway. *Id.* § III. B. Section III. D. of the policy also states "[t]hese requirements may be modified when authorized by the Chief." The Fire Chief is further given the power to "require installation of a fire access roadway when circumstances warrant." *Id.*

II. APPLYING FIRE APPARATUS ACCESS ROAD STANDARDS RETROACTIVELY.

Whether CFC Section 503 applies to streets legally in existence prior to the code's enactment is ambiguous. The code states FAAR's "shall be provided for every facility, building, or portion of a building *hereafter* constructed or moved into *or within* the jurisdiction." CFC § 503.1.1 (emphasis added). The use of the word "hereafter" suggests a prospective application, whereas "within" appears to refer to existing structures. CFC section 503 seems to be in conflict with the intent of the model fire code drafters.

A. Statutory Interpretation of CFC Section 503

In general, there is a presumption against the retroactive application of statutes absent a clear manifestation of intended retroactive application. *Evangelatos v. Superior Court,* 44 Cal. 3d 1188, 1209 (1988). Indeed, in California "a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." *Id.* California courts have added that "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." *Myers v. Phillip Morris Companies, Inc.*, 28 Cal. 4th 828, 841(2002) (citing *I.N.S. v. St. Cyr.*, 533 U.S. 289, 320-321, fn. 45 (2001); *Lindh v. Murphy,* 521 U.S. 320, 328, fn. 4 (1997) (A retroactive effect is only given if language is "so clear that it could sustain only one interpretation.").

City charters, ordinances, and voter-approved measures are interpreted by rules of statutory interpretation. *See Castaneda v. Holcomb,* 114 Cal. App. 3d 939, 942 (1981); *City of Berkeley v. Cukierman* 14 Cal. App. 4th 1331, 1338-1341 (1993); *Howard Jarvis Taxpayers Association v. County of Orange* 110 Cal. App. 4th 1375, 1381 (2003). The fundamental rule of statutory construction is to determine the intent of Legislature in enacting the statute and intent is determined first by the language of the statute itself. *People v. Aston,* 39 Cal. 3d 481, 489 (1985). *See also* Cal. Code Civ. Proc. § 1859. However, if the application of a statute would lead to absurd results based on a plain reading of the language, that language "should not be given a literal meaning." *Younger v. Superior Court,* 21 Cal. 3d. 102, 113 (1978).

It is unclear whether CFC section 503 is intended to apply retroactively. At first glance, the language in CFC section 503.1.1 looks retroactive in that it applies to "every facility, building, or portion of a building hereafter constructed or moved into or within the jurisdiction." The lack of punctuation makes its meaning unclear. The statute could be read either as covering "buildings constructed, or moved into, or within the jurisdiction," meaning it may apply to pre-existing structures and thus be retroactive. Alternatively, it could be read "buildings constructed, or moved into or within." The second reading does not show a retroactive intent because it would

only apply to buildings moved into or moved within the jurisdiction. This interpretation is consistent with the model code drafters' comment that CFC section 503 applies to new and relocated buildings within the jurisdiction. 2006 International Fire Code Commentary, p. 5-2.

A retroactive application of CFC section 503 could produce the "absurd results" contemplated by *Younger*. Retroactive application of the statute would be prohibitively expensive, so it makes sense that the model code drafters included a comment about FAAR's intended prospective application.

B. The CFC Contemplates Discretion to Apply Itself Retroactively

The scope of the CFC is contained in Appendix Chapter 1, section 102.[5] This section explains when the CFC construction and design provisions apply retroactively. Two areas in the CFC Appendix Chapter 1 are applicable here.

The first area concerns "[e]xisting structures, facilities and conditions which, in the opinion of the fire code official, constitute a distinct hazard to life or property." 2007 CFC, Appendix Chapter 1 § 102.1, Item 4. The City's "fire code official" is "the Fire Chief of the City." SDMC § 55.0101(d). The International Fire Code Committee explains that the fire code official's determination to apply the code to existing structures should come after a determination "that a distinct hazard exists." 2006 International Fire Code Commentary § 102.2. It further explains that a hazard does not exist "simply because a building does not comply with the most recent edition of the code." *Id.* Under Appendix Chapter 1, section 102.1, Item 4 of the 2007 CFC, retroactive application would only lie if so decided by the Department Fire Chief.

The second area states that the CFC applies retroactively to "[e]xisting structures, facilities, and conditions when identified in specific sections of this code." 2007 CFC, Appendix Chapter 1 § 102.1, Item 3. As noted above, it is uncertain if CFC section 503 was meant to apply retroactively. If read in conjunction with the code commentary, and current and past Department policies, it is clear that retroactive application is not required. Additionally, the Department takes the position noted above in CFC Appendix Chapter 1, Section 102.1, Item 4; the determination to retroactively apply CFC section 503 is discretionary.

C. The SDMC Contemplates Discretion to Apply the CFC Retroactively

When the City adopted the 2007 CFC, it also enacted SDMC section 55.0101(e) to clarify the CFC's possible retroactive application. The SDMC explains "[u]nless specifically stating that [SDFC sections] may be applied prospectively only, provisions of the San Diego Fire Code *may* be retrospectively applied in accordance with the 2007 California Fire Code, Appendix Chapter 1, section 102." *Id.* (emphasis added). Appendix Chapter 1 of the 2007 CFC was adopted in SDMC section 55.4801(a).

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[5] The applicable CFC Appendix Chapter 1 sections are included in the SDFC. SDMC § 55.4801(a).

The SDMC's statement that the SDFC *may* be applied retrospectively gives the Department some discretion in this area. SDMC § 55.0101(e). This permissive interpretation of CFC section 503 is consistent with Department policies, code drafter comments, and the SDFC itself.

D. The Intent of the Model Fire Code Drafters and CFC Section 503

The 2006 International Fire Code Commentary, written by the organization that drafted the model fire code enacted by the City, states that section 503 "introduces the requirements for dedicated fire apparatus access roads serving new and relocated buildings in the jurisdiction." 2006 International Fire Code Commentary, p. 5-2. No mention is made of existing structures, despite the ambiguous language in section 503.1.1 of the 2006 International Fire Code, which mirrors the language in CFC section 503.1.1.

The 2006 International Fire Code Commentary is also unclear on whether the language of CFC section 503.1.1 explicitly shows retroactive intent. The comment for CFC Appendix Chapter 1, section 102.1, regarding retroactive application of the model fire code, lists code sections where the code "specifically targets existing structures." 2006 International Fire Code Commentary, p. 1-8. In each of these sections, the code language refers specifically to "existing" buildings or structures. *See* CFC §§ 505.1; 801.1; 903.6; and 1027.1. There is no reference to "existing" roads in CFC section 503.

E. Department Policies and Retroactive Application of CFC Section 503

Consistent with the 2006 International Fire Code Commentary, the Department has adopted written policies clarifying the retroactive application of CFC section 503. Both policies show the Department's intent to apply the CFC retroactively, subject to the Fire Chief's discretion. Policy A-08-1 and Policy A-08-10 both specifically lay out procedure for applying CFC section 503 retroactively. Past Department policies have similarly interpreted prior FAAR sections.

In sum, the Department policies regarding retroactive application of CFC section 503 provide the Fire Chief the discretion to retroactively apply FAAR restrictions. The drafters of the model fire code commented that FAAR regulations would only apply to new and relocated buildings. Interpretation of CFC section 503 reveals inconsistencies and potentially absurd results should its restrictions automatically apply to every pre-existing building. Discretion to apply such requirements retroactively can be found in the CFC and the SDMC, and these principles are consistent with Department FAAR policies.

III. CITY LIABILITY WITH RESPECT TO FIRE-RESCUE SERVICES AND FAAR'S .

In California, public entity liability is defined by statute. *Davis v. City of Pasadena,* 42 Cal. App. 4th 701,703 (1996). This liability is contained in the California Government Claims Act (Act), codified beginning with California Government Code (Government Code) section 810. The Act states the general principle that "[a] public entity is not liable for an injury, whether such injury arises out of an act/or omission of the public entity or a public employee or any other person." Cal. Gov't Code § 815(a). Government entities are not liable "[e]xcept as provided by statute." Cal. Gov't Code § 815. They are also "subject to any immunity . . . provided by statute [and otherwise] subject to any defenses that would be available to the public entity if it were a private person." Cal. Gov't Code §§ 815(b).

Regarding FAAR's, the public entities are most likely to be exposed to liability under a dangerous public condition or a nuisance theory. Public entities have some immunity for both fire protection services and emergency response services. If a plaintiff is able to bypass these immunities, the plaintiff still must prove its cause of action in accord with established case law.

A. Fire Protection Services Immunity

Public entities have no duty to provide fire protection services. The Government Code states that "[n]either a public entity nor a public employee is liable for failure to establish a fire department or otherwise provide a fire protection service." Cal. Gov't Code § 850. Additionally, public entities and employees are protected from "injury resulting from failure to provide or maintain sufficient personnel, equipment or other fire protection facilities." Cal. Gov't Code § 850.2. The Government Code "provide[s] broad immunity from liability" for public entities that provide a fire-protection service. Cal. Law Rev. Com. to §§ 850 and 850.2. This immunity is not absolute, as seen below.

In *Vedder v. County of Imperial*, 36 Cal. App. 3d 654, 661 (1974), the court found defendant public entities liable for harming plaintiffs' businesses when gasoline and other inflammable chemicals stored on the defendants' property ignited. The defendants failed to provide any materials that would help prevent or control fire caused by their dangerous materials. *Id.* The appellate court held that fire-protection immunity statutes did not cover the defendants because "[t]hey should not be applied to allow a public entity to escape responsibility for damages resulting from its failure to provide fire protection on a property which it owns and manages itself, particularly where it permitted a dangerous fire condition to exist on the property." *Id.* at 660-61.

In contrast, *Cairns v. County of Los Angeles* reached the opposite conclusion when a fire burned plaintiffs' homes and fire protection services could not reach the area because access was blocked by defendant public entities' construction. *Cairns v. County of Los Angeles,* 62 Cal. App. 4th 330, 333 (1997). Plaintiffs sued under a dangerous public condition theory, contending "that defendants had a duty to repair and reopen [the road] for the purpose of a fire

road." *Id.* at 335. The court distinguished *Vedder* because "defendants did not store flammable materials on the closed . . . road; the closed road was not in itself a fire hazard; [and] the condition of the road did not cause the fire." *Id.* The court held that the plaintiffs were really complaining about the defendants' failure to provide fire protection service, and that defendants had immunity from this under the Act. *Id.*

Public entities have no duty to provide or maintain adequate fire-fighting services. Since there is no duty to provide the service, public entities have no liability even where fire services are provided and they are unable to respond. However, public entities must be careful not to create dangerous fire hazards and not take precautions to protect against an accident.

B. Emergency Response Immunity

Public entities have no duty to provide emergency services. The state legislature, through the California Health and Safety Code, encourages public entities to provide emergency services and, therefore, gives "qualified immunity from liability . . . for public entities and emergency rescue personnel providing emergency services."[6] Cal. Health & Safety Code § 1799.107(a). This section limits public entity liability for injury caused by emergency responders to actions "performed in bad faith or in a grossly negligent manner." *Id.* at (a). Courts have interpreted these sections to mean "that the statute does not impose a general duty upon emergency personnel to provide assistance whenever and wherever summoned." *Zepeda v. City of Los Angeles*, 223 Cal. App. 3d 232, 237 (1990).

Courts have imposed this immunity in a variety of situations. In *Zepeda*, the appellate court ruled that defendant public entities were not liable when their paramedics refused to treat plaintiff's son's injuries until police arrived. *Zepeda*, 223 Cal App. 3d at 236. Similarly, the California Supreme Court held that, absent a showing of bad faith or gross negligence, public entity defendants could not be liable after a three-year-old plaintiff was electrocuted and no emergency units responded to her parents' 911 call. *Eastburn v. Regional Fire Protection Authority*, 31 Cal. 4th 1175, 1179 (2003). Without the proper showing of gross negligence or bad faith, these public entities were immune from liability for any alleged harm caused by their failure to provide an emergency response.

Plaintiffs must be able to show that the emergency responders acted in bad faith or with gross negligence when responding in order to limit governmental immunity. As with fire protective services, there is no duty to provide emergency medical aid. Therefore, in most

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[6] Emergency rescue personnel includes:

> [A]ny person who is an officer, employee, or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, or of a private fire department, whether that person is a volunteer or partly paid or fully paid, while he or she is actually engaged in providing emergency services.

Cal. Health & Safety Code § 1799.107(d).

situations, government entities are immune for a failure to respond to requests for emergency service response.

C. Dangerous Condition

Government entities may be liable for keeping a dangerous condition on public property under Government Code section 835. Plaintiffs must show:

> (1) [A] dangerous condition existed on the public property at the time of the injury; (2) the dangerous condition proximately caused the injury; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against the dangerous condition.

Vedder, 36 Cal. App. 3d at 659.

Government Code section 830 states a dangerous condition "creates a substantial (as distinguished from minor, trivial or insignificant) risk of injury." Cal. Gov't Code § 830(a). Public entities may only be held liable "if [they have] acted unreasonably in creating or failing to remedy or warn against the condition." Cal. Law Rev. Com. to Cal Gov't Code § 830. "A condition is not dangerous within the meaning of the statute 'unless it creates a hazard to those who foreseeably will use the property . . . with due care.'" *Sambrano v. City of San Diego*, 94 Cal. App. 4th 225, 239 (2001) (*citing Mathews v. City of Cerritos*, 2 Cal. App. 4th 1380; 1384 (1992)). Public entities only need to keep "property in a way that is safe for 'careful use.'" *Milligan v. Golden Gate Bridge Highway and Transp. Dist.*, 120 Cal. App. 4th 1, 6 (2004).

For example, in *Vedder*, the defendants' storage of flammable materials was the proximate cause of plaintiff's injury. *Vedder,* 36 Cal. App. at 660-61. Conversely, in *Cairns*, a closed road was not the proximate cause of injury because it had no relation to the fire that burned plaintiffs' homes. *Cairns,* 62 Cal. App. 4th at 335.

D. Nuisance

Fire hazards can be public nuisances. *County of San Diego v. Carlstrom*, 196 Cal. App. 2d 485, 489-91 (1961). Under the Government Code, "a nuisance is anything injurious to health or indecent or offensive to the sense, or an obstruction of the free use of property." *Id.* at 490. Public nuisances affect whole communities or neighborhoods. *Id.* However, courts tend only to hold unnecessary, extreme, or unbearable fire hazards to be nuisances. *Id.* at 490-91. For example in *Carlstrom*, the defendant public entity maintained an old unoccupied building that created an "unnecessary and extreme danger to the life, property and happiness of others." *Id.* at 491. The court held that the property in that case "create[d] and maintain[ed] . . . fear in the

lives of the people of that community." *Id.* That fear must be "different in kind" than the fear suffered by the general public because of the condition. *Brown v. Petrolane Inc.*, 102 Cal. App. 3d 720, 726 (1980).

CONCLUSION

The City does not have to apply CFC section 503 retroactively. Instead, the decision to apply the statute to pre-existing streets rests with the Department Fire Chief. This is in accord with the SDFC, commentary by model code drafters, the SDMC, and existing Department policies. Decisions regarding SDFC's retroactive application should follow established procedures to avoid any issues regarding selective enforcement. The City should consider clarifying the language of CFC section 503.1.1, as its lack of punctuation makes interpretation difficult.

The City, if unable to respond to an emergency on a pre-SDFC street, has immunity available for both its fire protection service and its emergency response service. However, a showing of bad faith, gross negligence, or a City-created fire-hazard may subject the City to liability. An action brought on by a dangerous public condition has the hurdle of showing that a narrow road was the proximate cause of the injury. A nuisance claim must also show that the road created an unnecessary or extreme danger. It is therefore unlikely that a plaintiff will be able to breach the City's fire-rescue and emergency responder statutory immunities or prove a cause of action against the City.

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By _____
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ML-2010-15