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**MEMORANDUM OF LAW**

**DATE:** November 7, 2016  
**TO:** Councilmember Christopher Cate  
**FROM:** City Attorney  
**SUBJECT:** City of San Diego Safe Exchange Pilot Program

**INTRODUCTION**

Councilmember Cate is interested in partnering with the San Diego Police Department (Department) to establish a “Safe Exchange Zone” pilot program at Northeastern Division. Throughout the country, communities are providing these locations for their citizens to conduct e-commerce transactions and community exchanges in a public area. The proposed program raises two main legal issues: the scope of the City of San Diego’s (City) liability as the property owner and creator of the “Safe Exchange Zone,” and whether the City can minimize potential liability for injuries incurring at these locations through warnings on signage and other advertisements.

**QUESTIONS PRESENTED**

1. What is the City’s liability if “Safe Exchange Zones” are established at the Department’s facilities for the public to conduct private transactions unrelated to any law enforcement purpose?
2. How can the City reduce its potential liability for injuries that occur at the “Safe Exchange Zone” sites?

**SHORT ANSWERS**

1. The City may be held liable for maintaining or creating a dangerous condition of public property if the physical condition of the Zones increases the risk of criminal activity. Additionally, the City may have liability if it assumes a duty to provide a certain level of police protection.

2. The City can reduce its risk of liability by providing warnings regarding any known physical characteristics of the Safe Exchange Zone locations that could increase the risk of criminal activity. The City can also reduce the risk of inadvertently assuming a duty to provide protection by giving appropriate notice that the designated locations are not monitored or supervised.

## ANALYSIS

### I. THE CITY MAY BE HELD LIABLE UNDER A THEORY OF DANGEROUS CONDITIONS IF THE CONDITION OF THE “SAFE EXCHANGE ZONE” LOCATIONS INCREASES THE RISK OF CRIMINAL ACTIVITY.

The sole statutory basis for imposing liability on the City as a property owner is under a theory of dangerous condition of public property pursuant to Government Code section 835. *Cerna v. City of Oakland*, 161 Cal. App. 4th 1340, 1347 (2008) (internal citations omitted). Under section 835, the City is liable for an injury caused by a dangerous condition of its property if a plaintiff can demonstrate that: (1) the property was in a dangerous condition at the time of the injury; (2) the injury was caused by the dangerous condition; (3) it was reasonably foreseeable that the kind of injury suffered by the plaintiff would be created by the dangerous condition; and (4) either a City employee’s negligence created the dangerous condition or the City had notice of the dangerous condition a sufficient time prior to plaintiff’s injury to have taken measures to protect against it. Cal. Gov’t Code § 835. The City cannot be held liable for minor, trivial or insignificant risks. Cal. Gov’t Code § 830(a).

Here, we are concerned about an increase in third party criminal conduct at the Safe Exchange Zone sites. “[T]hird party conduct by itself, unrelated to the condition of the property, does not constitute a ‘dangerous condition’ for which a public entity may be held liable.” *Zelig v. Cnty. of L.A., et al.*, 27 Cal. 4th 1112, 1134 (2002) (quoting *Peterson v. S.F. Cmty. Coll. Dist.*, 36 Cal. 3d 799, 810 (1984)). The City also cannot be held liable for failing to provide sufficient patrolling or police protection at a parking lot, as it is specifically immunized from liability for such failure by Government Code section 845.2. *Slapin v. L.A. Int’l Airport*, 65 Cal. App. 3d 484, 487 (1976). However, a public entity may be liable if it maintained the property in such a way so as to increase the risk of criminal activity or in such a way as to create a reasonably foreseeable risk of criminal conduct. *Zelig*, 27 Cal. 4th at 1134-35 (internal citations and quotation marks omitted). To do so, however, a plaintiff must prove that there is some defect in the property itself and establish a causal connection between the defect and the injury. *Id.* at 1135.

In *Peterson*, the court held that the condition of a community college campus may be dangerous if the presence of trees with thick foliage near a parking lot and stairway facilitated criminal activity against students. In that case, the risk of crime was reasonably foreseeable because the school district was aware of prior assaults. *Id.* at 1135 (citing *Peterson, supra*, 36 Cal. 3d at 813). In contrast, the court in *Zelig* held that the local agency was not liable where

plaintiff was shot in a courthouse by her ex-husband because nothing about the physical condition of the courthouse increased her risk of injury. *Id.* at 1137.

Here, the City could be held liable under a dangerous condition theory if it establishes a Safe Exchange Zone in an area where the location's physical characteristics substantially increase the risk of criminal activity. For example, a plaintiff may establish liability against the City if the Zone is in a secluded area or, like in *Peterson*, it has features that obscure visibility. But, such risk can be mitigated against by establishing the Zones in well-lit, wide-open parking lots or other public spaces that are subject to video surveillance.

## **II. THE CITY MAY ALSO BE FOUND LIABLE IF IT ASSUMES A DUTY TO PROVIDE A CERTAIN LEVEL OF PROTECTION TO PATRONS USING THE SAFE EXCHANGE ZONES.**

Public entities generally are not liable for failing to protect individuals against crime: "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." *Zelig*, 27 Cal. 4th at 1128-29. However, "[l]iability may be imposed if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so, or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff." *Id.* at 1129 (citations omitted). Courts have denied recovery "for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection." *Williams v. State of Cal.*, 34 Cal. 3d 18, 25 (1983).

By establishing Safe Exchange Zones at police stations, and publicly advertising such Zones as safe, the City may be exposed to liability if a plaintiff were able to demonstrate that the City voluntarily assumed a duty to provide a particular level of protection, and then failed to do so. *Zelig*, *supra*, 27 Cal.4th at 1129. For example, if City officials guaranteed that the Safe Exchange Zones were safe, agreed to provide increased police protection at the locations or otherwise made statements which "induced a false sense of security and thereby worsened a plaintiff's position," a potential plaintiff may claim that he or she relied upon these representations to their detriment. *Id.* at 1130. Therefore, the City may have liability for injuries caused by third-party criminal conduct if it creates an expectation that police officers will be monitoring or supervising the transactions or providing security to the participants involved in the exchanges.

## **III. THE CITY'S LIABILITY MAY BE REDUCED BY UTILIZING CLEAR SIGNAGE AND/OR PRINTED NOTIFICATION.**

Should the City decide to proceed with establishing a Safe Exchange Zones program, liability for known risks due to the physical condition of a proposed location can be minimized by posting warning signs. As noted above, a City can "take measures" to protect against potential

dangerous conditions, and therefore avoid liability for harm. Cal. Gov't Code § 835. "Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." Cal. Gov't Code § 830(b). Therefore, the City can reduce its risk by providing warnings of any known physical characteristics of the Safe Exchange Zone locations that could increase the risk of criminal activity.

To avoid claims of detrimental reliance where members of the public may be induced into believing that they are being provided with increased police protection the City should also provide notice to the community, via signage at the locations, information provided about the program, and/or in advertising materials, that the locations are not monitored or supervised and the City assumes no liability for injuries that may occur at the locations. The City should also consider removing the term "safe," and instead call the locations Exchange Zones, Internet Purchase Exchange Locations, or something similar.

### CONCLUSION

A Safe Exchange Zone program can be a way for the City to facilitate safer transactions for residents buying or selling items listed on internet websites. As the property owner, the City can be held liable for creating or maintaining a dangerous condition of public property if the physical characteristics of these locations create a foreseeable risk of criminal activity or if the City assumes a duty to provide additional police protection at these sites. The City can, however, mitigate these risks by establishing these Zones in open, well-lit, and maintained locations and by providing notice to the community that the Zones are not monitored or supervised by the Department.

JAN I. GOLDSMITH, City Attorney

By /s/ Christina Milligan  
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