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# MEMORANDUM OF LAW

**DATE:** January21, 2016

**TO:** Honorable City Council

**FROM:** City Attorney

**SUBJECT:** Hazard Warnings for Construction Activity

## INTRODUCTION

This Office has been asked to explain the City's duty to provide hazard warnings for construction activityand if such warnings might relieve the City from liability for harmcaused by such construction activity. This memorandum will address when construction activity may create a dangerous condition that would require the posting of a warning sign or marking.

## QUESTIONS PRESENTED

1. Does the City have a dutyto provide hazard warnings for construction activity?

2. Would a specific hazard warning for construction activityrelieve the City from liability for injuries caused by such activity?

## SHORT ANSWERS

1. If construction activitycreates a dangerous condition, the City may have a duty to provide a warning to the public. A dangerous condition that is not obvious to motorists or pedestrians using due care will require the posting of signs or some other warning, but the absence of a warning sign itself should not be considered a dangerous condition.

2. Maybe. Dangerous condition liability is evaluated on a case-by-case basis. The City may be able to avoid liability if it can show that it took reasonable actions to protect against the risk of injurycreated by a dangerous condition. There are probably not any warnings the City can provide that will insulate the City from liability with 100% certainty.

## ANALYSIS

### I. THE CITY HAS A DUTY TO PROVIDE ADEQUATE WARNING SIGNS WHEN CONSTRUCTION ACTIVITY CREATES A DANGEROUS CONDITION.

Determining when the City has a duty to provide hazard warnings requires understanding how the law treats dangerous conditions of public property. A dangerous condition is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Cal. Gov't Code § 830(a).

Generally, a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition was created by its employee, or if the public entity had actual or constructive notice of the dangerous condition with sufficient time to have protected against it prior to when the injury occurred. Cal. Gov't Code § 835. Construction activities, either by City forces or contractors hired by the City, have the potential to create dangerous conditions that pose a substantial risk of injury to the public, particularly when such activities occur in the public right-of-way. In situations where construction activities have created a dangerous condition, the City will most likely be considered to have notice (actual or constructive) of the condition, because it was the actions of the City or its contractors that created the hazard.[1]

Generally, a public entity is not liable "for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code." Cal. Gov't Code § 830.8. Liability can exist, however, if such hazard warnings were "necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." *Id*. In *Mixon v. State*, a father and his children were hit by a truck at night while crossing an intersection with a marked crosswalk but no traffic signal. *Mixon v. State,* 207 Cal. App. 4th 124 (2012). The court found that the lack of street lighting, lack of a traffic control signal, lack of pedestrian crossing warning signs, and insufficient crosswalk markings did not create "a substantial risk of injury when the intersection is used by pedestrians and motorists with due care." *Id.* at 132. The court determined that "the statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices." *Id.* at 135 (citation omitted).

Conversely, in *Gardner v. City of San Jose*, the court considered the lack of street lighting, lack of a traffic control signal, lack of pedestrian crossing warning signs and no crosswalk markings to be important factors in determining the city's liability for a dangerous condition. *Gardner v. City of San Jose,* 248 Cal. App. 2d 798, 803-05 (1967). In that case, a girl was struck by a car while crossing the street at an intersection during the evening, very much like the father and his children in *Mixon*. However, in *Gardner*, the city had constructed a pedestrian

[1] This memorandum is intended only to address construction activities, particularly those that involve ripping up or breaking apart portions of a street or sidewalk. In these situations, the City is clearly aware that the street or sidewalk is no longer safe for pedestrians or vehicles.

subway beneath the street to protect pedestrians while crossing. On the night of the accident, the lights in the subway were not functioning, so the girl was forced to cross on the street above where the accident occurred. The court determined that the city had created a dangerous condition by its failure to maintain the pedestrian subway. *Gardner*, 248 Cal. App. 2d at 803. Then, because the dark subway tunnel was a dangerous condition and would force a pedestrian to cross the street in the path of vehicle traffic, the city's failure to provide any hazard warnings on the street contributed to its liability for that dangerous condition.

The important distinction here is that the lack of hazard warnings (or traffic control devices) did not create a dangerous condition on its own. A dangerous condition must already exist first. Other courts have found that, where a dangerous condition already exists, the lack of hazard warnings can contribute to a public entity's liability. In *Washington v. City and County of San Francisco*, a motorcyclist was killed when he collided with an oncoming vehicle at an intersection where no warning signs were posted. *Washington v. City and County of San Francisco,* 219 Cal. App. 3d 1531 (1990). Shadows cast upon the intersection by a freeway overhead and the visual obstruction of the pillars supporting the freeway created a dangerous condition where oncoming drivers could not see each other. *Id.* at 1534-35. The court determined the public entity was liable for the failure to provide a hazard warning where a dangerous condition existed but may not have been apparent even to someone exercising due care. *Id.* at 1537.

Under the current statutory framework, the City will not be liable for a failure to post a hazard warning (or other sign, marking, control device, etc.) where there is no pre-existing dangerous condition; the lack of hazard warnings by itself cannot constitute a dangerous condition. When the City's construction activities, such as maintenance work in the public right-of-way, create a dangerous condition, then the City has a responsibility to provide hazard warnings. It might be argued that the City should not be obligated to provide hazard warnings where a dangerous condition is so obviously apparent that a person exercising due care would face no substantial risk of injury. Trying to determine what might be obviously apparent enough to warrant no hazard warning at all, however, is a difficult endeavor.[2] A more conservative approach for the City would be to provide hazard warnings in any situation where construction activities have the possibility to cause injury to pedestrians or motorists.

## II. THE CITY MAY BE RELIEVED OF LIABILITY IF IT PROVIDES SUFFICIENT HAZARD WARNINGS FOR DANGEROUS CONDITIONS CAUSED BY ITS CONSTRUCTION ACTIVITIES.

Once the City has created a dangerous condition by its construction activities and recognized the necessity for some form of hazard warning, the next step is to determine what type of warning would be sufficient to fulfill the City's duty to warn pedestrians and motorists of the potential danger. In situations where the City is on actual or constructive notice of a

[2] In *Engleson v. Little Falls Area Chamber of Commerce*, a pedestrian at a city fair brought an action against the city after she tripped and fell over an orange traffic cone that had been placed in the street to help with crowd control. 362 F.3d 525 (8th Cir. 2004). Though the court did not find the city liable for creating a dangerous condition, it serves as an example that pedestrians and motorists can find ways to injure themselves even despite the most obvious of warnings.

dangerous condition, it will not be liable for injuries caused if it can establish "that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable." Cal. Gov't Code § 835.4(b). Unfortunately, there is no bright line rule as to what form of hazard warning, sign, or marking will be considered reasonable in any given situation. Instead, each situation must be evaluated on a case-by-case basis. *See* 2013 City Att'y MOL 125 (2013-16; August 29, 2013).

"Reasonableness is a question of fact for the trier of fact, and is determined by weighing the probability and gravity of potential injury against the practicability and cost of the action." *Biron v. City of Redding*, 225 Cal. App. 4th 1264, 1281 (2014) (citations omitted). In *Biron*, an apartment building in the downtown area was flooded during a storm because the city had not upgraded a nearby storm drain to a capacity capable of handling the higher than expected rainfall. Evidence presented at trial showed that a study of the region ranked the downtown area as the lowest priority for upgrades to the storm drain system, as it was typically the least impacted, and that the cost of upgrading the nearby storm drains would be a $7.5 million cost for a program that was already "grossly underfunded and lacking in available funds for improvement of the system." *Id.* at 1281-82. The court ultimately concluded that, because the "the risk of injury was small in relation to the cost of repairs," the city's decision not to upgrade the system was reasonable even if it created a dangerous condition. *Id.* at 1282.[3]

As shown in *Biron*, the City's decision as to whether or not to provide hazard warnings and what type of warnings would be sufficient will be evaluated by a balancing test. That test will compare how likely an injury is to occur and how serious an injury might be against the cost and practicality of preventing that injury. In the case of construction activities, particularly in the public right-of-way, the probability and severity of potential injuries will depend on factors such as the volume of traffic, the work being performed, and whether the dangerous condition is obvious to pedestrians and motorists. Because the probability and severity of injury during construction activities in the public right-of-way is higher than when construction is not occurring, a conservative approach would be to provide hazard warnings in any situation where construction activities have the possibility to cause injury to pedestrians or motorists. In most situations, temporary signs, traffic cones, or directly-applied markings on the road or sidewalk are relatively low-cost and easily performed, so the balancing test will weigh heavily in favor of providing such measures. But because balancing is involved, there is no warning device or method that can insulate the City from liability with 100% certainty.

[3] Storm drain and drainage channel liability has been addressed by this Office in other memos. *See,* City Att'y MOL No. 2015-19 (December 14, 2015).

## CONCLUSION

In situations where the City's construction activities in the public right-of-way would constitute a dangerous condition, the City has a duty to provide warning signs or markings, particularly in situations where the dangerous condition is not readily apparent to motorists or pedestrians. When the City takes reasonable steps to protect against the risk of injury caused by the dangerous condition, it may be relieved of liability if it can show that the measures it took were sufficient given the probability and the severity of the potential injury.

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By /s/
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