

MEMORANDUM OF LAW

DATE: May 24, 1995
NAME: Councilmember Scott Harvey

FROM: City Attorney

SUBJECT: Protection of City from Lawsuits

QUESTION

In your memorandum of May 5, 1995, you asked whether the City might be exposing itself to civil liability for injuries to transients resulting from their consumption of contaminated food in dumpsters located on the public right-of-way. Our answer and analysis follows.

ANSWER

Any civil lawsuit brought against the City by an individual who became ill from consuming food in dumpsters on the public right-of-way would, in all probability, be resolved in favor of the City.

ANALYSIS

The basis of any civil liability on the part of the City under the circumstances you have outlined would arise under the provisions of Government Code section 835 which provide as follows:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Government Code section 830 defines "dangerous condition" as "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."

It is questionable whether a person is using "due care" when he consumes items removed from a trash receptacle. Additionally, San Diego Municipal Code section 66.0301 generally makes it unlawful "to rummage in, disturb, or interfere in any manner with refuse, . . . to remove such refuse or any portion thereof from the location where the same was placed by the owner thereof, or to remove the contents or any portion thereof from any refuse container." In view of the fact it is unlawful to remove items from a trash receptacle, and since a strong argument can be made that it is foolhardy to consume such items, it is likely a jury would determine that no dangerous condition of public property existed; hence, no liability.

Moreover, even if a jury were to determine that a dangerous condition of public property existed, the City would assert certain defenses that should relieve the City of any liability. For example, under Government Code section 835.4, the City would not be liable

"for injury caused by a dangerous condition of its property if the public entity establishes 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. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."

The cost of taking steps to prevent people from removing items from City dumpsters would be great and such cost and practicability far outweighs the probability and gravity of potential injury to persons. For that reason, a jury would probably rule in favor of the City even if a dangerous condition of property existed. Additional defenses that would be raised by the City would be assumption of the risk and comparative negligence on the part of the plaintiff.

CONCLUSION

It is extremely unlikely that the City of San Diego would be held civilly liable to an individual who became ill as a result of consuming substances unlawfully removed from refuse containers on the public right-of-way.

JOHN W. WITT, City Attorney
By

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