Office of
The City Attorney
City of San Diego

MEMORANDUM

DATE: February 19, 2009

TO: Council President Ben Hueso and Councilmembers

FROM: City Attorney

SUBJECT: Potential Liability of a City Arising out of Building Ownership

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INTRODUCTION

On November 7, 1988, the City Council adopted Ordinance Number O-17172 requiring the installation of automatic fire sprinkler systems in all existing high-rise buildings. Buildings or structures owned by governmental agencies other than the City of San Diego are excluded under the definition of "high-rise buildings." The original ordinance established January 1996 as the compliance date for fire sprinkler retrofitting. The compliance deadline was subsequently extended in 1991, 2001, 2004, and 2008 by the City Council. Please see the attached *Executive Summary* for the February 2, 2009 City Council hearing, for more information on the history of the City's changes to the fire sprinkler requirements. The current deadline for compliance under the Municipal Code is January 1, 2009.

On February 2, 2009, the City Council once again discussed whether or not to extend the deadline for compliance with the requirement for the installation of fire sprinklers for the City Administration Building [CAB]. At that meeting, the Council requested a legal analysis of potential liability for the City that may result from extending the compliance date.

QUESTION PRESENTED

What is the potential tort liability of a city resulting from building ownership?

SHORT ANSWER

Generally, a city- like all governments- is immune from tort liability except as provided by statute under the state Government Claims Act. However, there are certain statutory exceptions to immunity such that a city may be held liable for failure to discharge a mandatory duty, for maintaining a hazardous condition on city property, and/or public nuisance.

ANALYSIS

A. Governmental Immunities from Tort Liability

1. General Immunity from Liability under the Government Claims Act

The California Government Claims Act (Government Code section 810 et seq.) provides the exclusive scope of governmental tort liability.[1] Under the Government Claims Act, all government tort liability must be based on statute. The general rule is set forth in Government Code section 815 as follows:

> Except as otherwise provided by statute:
>
> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity, a public employee, or any other person.
>
> (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

Government Code section 815 abolished all common law or judicially declared forms of liability for public entities, except such liability as may be required by the federal or state constitution. *Cochran v. Herzog Engraving Co,* 155 Cal. App. 3d 405, 409 (1984). Thus, a city may not be held liable for "common law negligence." *Van Kempen v. Hayward Area Park,* 23 Cal. App. 3d 822, 825 (1972); *People ex rel. Dept. of Transportation v. Superior Court,* 5 Cal. App. 4th 1480, 1484 (1992). Nor can liability be evaluated by the general negligence provisions of Civil Code section 1714. *Zelig v. County of Los Angeles,* 27 Cal. 4th 1112, 1132 (2002). It is well-established that liability against a public entity is confined to the statutory scheme of the Government Claims Act. *Id.* at 1127-1128; *See also, Cochran* at 409 (explaining that "in the absence of some constitutional requirement, public entities may be liable *only* if a statute declares them to be liable…In short, sovereign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute").

2. Immunity for City's Failure to Enforce, Enact, or Revoke

The Government Claims Act expressly provides that "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." Gov. Code § 818.2. Government Code section 818.4 establishes immunity for issuance or failure to issue or revoke any permit or approval, stating as follows:

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[1] Because the statutory scheme of Government Code section 810 et seq. includes claims sounding in contract and in tort, the Supreme Court of California determined "that 'Government Claims Act' is a more appropriate short title that the traditional 'Tort Claims Act." *City of Stockton v. Superior Court of Sacramento County*, 42 Cal. 4th 730, 741-742 (2007).

> A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

B. Statutory Exceptions Under the Government Claims Act

The following exceptions to the Government Claims Act may be a potential basis for tort liability arising out of building ownership by a city:

1. Dangerous Condition of Public Property

Under the Government Claims Act, dangerous condition of public property is a statutory species of liability. Gov. Code § 835. Government Code section 835 provides:

> 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, and 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.

To state a cause of action against a public entity under Government Code section 835, a plaintiff must plead: (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 property and sufficient time prior to the injury to have taken measures to protect against the dangerous condition. *Vedder v. County of Imperial,* 36 Cal. App. 3d 654, 659 (1974); *Ducey v. Argo Sales Co.,* 25 Cal. 3d 707, 715-716 (1979).

The Law Revision Commission Comment to Government Code section 830 states:

> The definition of "dangerous condition" defines the type of property conditions for which a public entity may be held liable but does not impose liability. A public entity may be held liable for a "dangerous condition" of public property *only if it has acted unreasonably* in creating or failing to remedy or warn against the condition under the circumstances described in subsequent sections. (Emphasis added.)

Public property may be in a dangerous condition because of the design or location of the improvement, the interrelationship of its structural or natural conditions, or the presence of latent hazards associated with its normal use. *Bonanno v. Central Contra Costa Transit Authority*, 30 Cal. 4th 139, 149 (2003). "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 (1992)).

In *Vedder,* the court determined that the County was not immune under Government Code sections 850 and 850.2 from a claim that injury had resulted from County property maintained in a hazardous condition under Government Code section 835. In that case, third parties leasing the airport property stored large amounts of gasoline and other combustible materials on the property. It was alleged that the County's "property was in a dangerous condition in that normal airport operations and the operation of businesses involving storage of large amounts of gasoline and other highly combustible chemicals created a severe risk of fire and/or explosion." *Id.* at 659. The County also allegedly "caused, permitted, and encouraged such operations with full knowledge that there were no means available to prevent or control gasoline fires." *Id.*

In that situation, the court held that:

> One who negligently stores gasoline and other highly combustible chemicals on his property, or knowingly permits such negligent storage, may be liable to others for a fire-incurred loss even though the fire was actually started by the negligent conduct of others.

Id. at 660. The court went on to explain that the immunities of Government Code sections 850 and 850.2:

> should not be applied to allow a public entity to escape responsibility for damages resulting from its failure to provide fire protection on property which it owns and manages itself, particularly where it has permitted a dangerous fire condition to exist on the property. In that situation, lack of fire protection is a proper factor to be considered as contributing to the existence of a dangerous condition on the property. (citation omitted).

Id. at 660-661.

In *Vedder*, the County knew, allowed, and encouraged explosive chemicals to be stored on the property and the failure to provide fire protection was a factor in the court's determination that the property was maintained in a hazardous condition.

In this case, the Fire Department recommends extending the deadline for compliance for fire sprinkler retrofitting because the risk of fire in CAB is not as high as in residential high-rise buildings. In addition, the fire station is close by and the response time minimal.

Finally, the Municipal Code provides more stringent fire sprinkler requirements than state law requires. The 2007 California Building Code requires fire sprinkler retrofitting in limited circumstances for existing high-rise buildings of Type II-B, III-B, or V-B construction. 2007 CBC § 3412.27. CAB is of a Type I-A construction; therefore, the California Building Code does not require fire sprinklers to be installed in CAB.

Generally, the City Council has adopted the California Building Code by reference. However, the City Council has also made findings and adopted different, more stringent fire sprinkler retrofitting requirements within the Municipal Code. Specifically, San Diego Municipal Code section 55.0903 requires the installation of fire sprinkler systems in all existing high-rise buildings, as those buildings are defined in that section. Sub-section 903.6.2.8, Violations, states:

> (1) It is unlawful for any owner of a high-rise building to allow any person to occupy any portion of a high-rise building subject to the provisions of this section except where: (1) the *Fire Code Official* or City Manager has, in writing, authorized the occupancy; or (2) the owner is complying with the implementation schedule set forth in this section; or (3) the occupant is performing construction or maintenance related to installation or maintenance of an automatic fire sprinkler system; (4) the owner of the high-rise building agreed in writing prior to January 1, 2004 to demolish the high-rise building by January 1, 2000.
>
> (2) It is unlawful for any owner of a high-rise building to allow any person to occupy any portion of a high-rise building after January 1, 2009, where occupancy has been authorized pursuant to this section, except where: (1) the occupant is performing minimal maintenance to prevent the high-rise building from being in an unsafe condition; or (2) the occupant is performing construction or maintenance to the building related to the installation or maintenance of an automatic fire sprinkler system; or (3) an approved fire sprinkler has been completely installed.

2. Fire Hazard and Public Nuisance

The *Vedder* court determined that the County's failure to provide fire suppression facilities at the airport was also a factor in establishing the existence of public nuisance for which the County could be held liable: As the court explained:

> Government Code section 815 does not bar nuisance actions against public entities to the extent that such actions are founded on Civil Code sections 3479, 3480 and 3481, which define public and private nuisances. (Citations omitted). A fire hazard constitutes a public nuisance. (Citations omitted)...
>
> What we have said earlier with respect to proximate cause and non-applicability of Government Code sections 850 and 850.2 applies equally here. The pleading makes it clear that plaintiffs are contending the negligent acts of the nonpublic defendants and the existence of a public nuisance (a fire hazard) on the publicly owned and managed airport property both proximately caused their injuries and damage. It is also clear that plaintiffs are contending the public nuisance on the airport property resulted from a combination of permitting the storage of gasoline and other highly combustible chemicals and not requiring or providing adequate fire protection facilities. The Government Code sections respondents rely upon are not intended to provide immunity under these circumstances, nor do they preclude consideration of a lack of fire protection in determining whether a public nuisance in fact existed.

Vedder at 661.

Again, in the *Vedder* case there were other hazardous conditions on the property that when combined with the lack of fire suppression facilities were the basis for liability for public nuisance.

3. Failure to Discharge a Mandatory Duty

Government Code section 815.6 provides an exception to the general rule that a public entity is not liable for an injury, whether the injury arises out of an act or omission of the public entity, a public employee, or any other person, stating as follows:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Government Code section 815.6 allows liability to be imposed on a public entity for breach of a mandatory duty where an express enactment (statutory or regulatory) imposes a non-discretionary obligation designed to protect against the risk of a particular injury. *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 498-499 (2000). A three-prong test is used to determine whether liability may be imposed on the public entity under this section: (1) the enactment must impose an "obligatory" function, rather than describing a "merely discretionary or permissive" course of action; (2) the enactment must be "designed" to protect against the type of injury suffered; and (3) breach of the mandatory duty must be the proximate cause of the injury suffered. *Id*; *Sutherland v. City of Fort Bragg,* 86 Cal. App. 4th 13, 19 (2000).

Even where language of an enactment appears mandatory, if significant discretion is required to carry out any duty imposed, "that duty is not mandatory within the meaning of section 815.6 and thus breach of the duty will not support tort liability." *Sutherland v. City of Fort Bragg*, 86 Cal. App. 4th at 18-20 (immunity found under section 815.6 related to failure to enforce two-exit provision of Uniform Fire Code); *See also, MacDonald v. State of California*, 230 Cal. App. 3d 319, 326-328 (1991).

If adopted by the City Council, the proposed ordinance will extend the deadline for compliance with fire sprinkler retrofitting requirements for high-rise buildings from January 1, 2009 to January 1, 2011. If the ordinance is not adopted by City Council, the City will not be in compliance with the requirements of the Municipal Code.

CONCLUSION

Generally, a city- like all governments- is immune from tort liability except as provided by statute under the state Government Claims Act. However, there are certain statutory exceptions to immunity such that a city may be held liable for failure to discharge a mandatory duty, for maintaining a hazardous condition on city property, and/or public nuisance.

JAN I. GOLDSMITH, City Attorney

By

Nina M. Fain
Deputy City Attorney

NMF:pev
Attachment
cc: Darren Greenhalgh, Deputy Director
Jeff Sturak, Office of the Independent Budget Analyst
MS-2009-2

EXECUTIVE SUMMARY SHEET
CITY OF SAN DIEGO

DATE ISSUED:
REPORT NO:
ATTENTION: Council President and City Council
ORIGINATING DEPARTMENT: Engineering and Capital Projects Department
SUBJECT: Fire Sprinkler Retrofitting for High Rise Buildings
COUNCIL DISTRICT(S): 2 (Faulconer)
CONTACT/PHONE NUMBER: Darren Greenhalgh, (858) 573-5019

REQUESTED ACTION:
Introduction of an Ordinance amending Chapter V, Article 5, Division 9 of the San Diego Municipal Code by amending Section 55.0903 pertaining to Fire Protection and Prevention, to extend the required compliance date for sprinkler retrofits of high rise buildings to January 1, 2011.

STAFF RECOMMENDATION:
Approve the Ordinance.

EXECUTIVE SUMMARY:
In 1986, the Mayor and City council passed Ordinance Number O-17172 requiring fire sprinkler retrofitting for high rise buildings. Specific exemptions were granted including all Government buildings except for those owned by the City of San Diego. In 1991 the Council extended the deadline for compliance from 1996 to 1999, unless the owner declared their intent to demolish the building by January 1, 2000. In 1995 the City passed resolution number R-286760 declaring the City's intent to demolish the City Administration Building (CAB) prior to January 1, 2000.

On June 5, 2001 Ordinance Number O-18946 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofit Ordinance until January 1, 2004. In addition, the City Council authorized a phase funded design build contract to continue with the installation of a fire sprinkler system.

On January 13, 2004 Ordinance Number O-19254 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofitting Ordinance until January 1, 2008.

On January 8, 2008 Ordinance Number O-19696 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofitting Ordinance until January 1, 2009.

On December 2, 2008 an ordinance to extend the compliance deadline for the Fire Sprinkler Retrofitting Ordinance was heard, but not approved by the City Council.

The current Fire Sprinkler system includes the: backflow valve, pump, transfer switches, standpipe, alarm system, and sprinklers in the basement and on the 10th, 11th, 13th, 14th and 15th floors. Remaining work includes the: emergency backup generator, additional upgrades to the alarm system, and fire sprinklers in all the elevator lobbies and on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 12th floors. The cost of this remaining work is estimated to be in excess of $5,000,000.

On July 31, 2007, CCDC issued a request for qualifications to redevelop the Civic Center Complex. The proposed redevelopment of the Civic Center Complex has proceeded with the peer review and financial analysis which was estimated to be complete in December. Presentations to the Centre City Development Board (CCDC), the Rules Committee and the City Council are anticipated in early 2009. If this project were to move forward the completion of the fire sprinkler system in CAB would not be necessary. Should the proposed redevelopment of the Civic Center Complex not take place, the completion of the final phase of the sprinkler system project would need to be

completed. Extending the deadline for compliance with the Fire Protection and Prevention Ordinance to 2011 will allow time for the completion of the evaluation of the redevelopment process for Civic Center Complex.

FISCAL CONSIDERATIONS:
No funding is currently necessary for this action; however, if City Council does not approve the extension $5,000,000 will need to be added to this year's Capital Improvement Program Budget in order to complete the fire Sprinkler System at CAB. Funding for this project has not been identified.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

- 1986, the Mayor and City Council passed Ordinance Number O-17172 requiring fire sprinkler retrofitting for high rise buildings .
- 1991 the Mayor and City Council extended the deadline for compliance from 1996 to 1999$1,200,000 appropriation for the South Course Renovation through the FY 2006 budget process.
- 2001 Ordinance Number O-18946 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofit Ordinance until January 1, 2004
- 2004 Ordinance Number O-19254 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofitting Ordinance until January 1, 2008
- 2008 Ordinance Number O-19696 was adopted extending the deadline for compliance with the Fire Sprinkler Retrofitting Ordinance until January 1, 2009
- On December 2, 2008 an ordinance to extend the compliance deadline for the Fire Sprinkler Retrofitting Ordinance was heard, but not approved by the City Council.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:
None

KEY STAKEHOLDERS AND PROJECTED IMPACTS:
The City of San Diego's City Administration Building is one of the few remaining high rise building without complete fire sprinkler protection in the City of San Diego.

Afshin Oskoui, Assistant Director
Engineering & Capital Projects Department

David Jarrell, Deputy Chief
Public Works