MEMORANDUM OF LAW

DATE: June 1, 1999

TO: Natural Resources & Culture Committee

FROM: City Attorney

SUBJECT: *Yukon Project*

QUESTION PRESENTED

Does the intentional sinking of a ship (the *Yukon*) on the City-owned ocean bottom, for the purpose of allowing access by scuba divers for recreational uses, create personal injury liability exposure for the City of San Diego?

SHORT ANSWER

The California Government Code provides public entities with a statutory immunity from liability for injuries or death (personal injury) to persons engaged in "hazardous recreational activities" on the public entity's property. Scuba diving, and in particular wreck diving, would be considered a "hazardous recreational activity" and, in general, the immunity would apply to protect the City from liability for personal injury to a scuba diver. The California Government Code does specify certain exceptions which defeat the immunity from liability for injuries from "hazardous recreational activities," however, it is doubtful any of the exceptions would apply.[1] The defense of "assumption of the risk" should also protect the City from liability for personal injury to a scuba diver.

DISCUSSION

1. Application of "hazardous recreational activity" immunity to wreck diving.

A public entity is not liable to any person who participates in a hazardous recreational activity. Cal. Gov't Code 831.7(a). "Hazardous recreational activity" is defined as "a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or spectator." Cal. Gov't Code 831.7(b). "Hazardous recreational activities" expressly include:

(1) *Water contact activities*, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

(2) Any form of diving into water from other than a diving board . . .

(3) . . . boating, . . . surfing, . . . water skiing . . . wind surfing [and numerous other expressly enumerated activities]

Cal. Gov't Code 831.7(b).

Scuba diving is a "water contact activity." Although the section states "except diving," since the following section deals with "diving into water," the language, "except diving," should be interpreted as referring to diving into water, not scuba diving. (The various parts of a statutory enactment must be harmonized in the context of the statutory framework as a whole. *Decker v. City of Imperial Beach,* 209 Cal. App. 3d 349, 354 (1989).)

Scuba diving, as a water contact activity, is therefore a hazardous recreational activity where lifeguards are not provided and either a warning of their absence is given or the scuba diver should reasonably know that no lifeguards are provided. The requirement regarding the absence of lifeguards and reasonable knowledge of this by scuba divers appears to be met. The Manager's Report, dated July 23, 1998, states the *Yukon* will be located "approximately 1.5 miles from shore;" therefore a scuba diver should reasonably know that any lifeguards on shore are not provided to monitor the wreck site. Even if the wreck site is closer to shore, a scuba diver should reasonably know that lifeguards on shore are not provided to monitor the wreck site under the surface of the water. Likewise, a scuba diver should reasonably know that a roving lifeguard boat patrol on the surface is not provided to monitor the wreck site below the ocean surface. Even though a diver should reasonably know that no lifeguards are provided at the wreck site, in an abundance of caution, it is suggested that signs stating "No Lifeguards Monitor Divers Or The Wreck Site," or other similar language, be posted on the buoys which the Manager's Report states will mark the wreck site.

2. Possible exceptions to immunity for wreck diving as a "hazardous recreational activity."

Although scuba diving at the wreck site would be a "hazardous recreational activity" within the meaning of California Government Code section 831.7, and immunity from liability for injuries would generally apply, there are five exceptions to the immunity provisions of that section. It does not appear any of these exceptions would defeat immunity.

The first exception to the "hazardous recreational activity" immunity occurs when the public entity fails "to guard or warn of a known dangerous condition or of another hazardous recreational activity . . . that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity" in which they are participating. Cal. Gov't Code 831.7(c)(1). This exception to defeat immunity should not apply. All the dangers of scuba diving, and the enhanced dangers of wreck diving (being trapped in or injured by parts of the

wreck) would be reasonably assumed by the diver as inherently a part of the hazardous recreational activity. The only other hazardous recreational activity that may endanger a scuba diver would be boating, however, this danger is also inherently a part of scuba diving (scuba diving training classes teach methods to detect and avoid boats). A plaintiff cannot defeat the immunity by arguing they personally were not aware of the inherent risks. An individual plaintiff's knowledge of any particular risk is irrelevant, the determinative factor is what a reasonable participant would assume to be an inherent danger in the activity. *Perez v. City of Los Angeles,* 27 Cal. App. 4th 1380, 1383-1388 (1994).

The second exception to the "hazardous recreational activity" immunity occurs when the public entity charges a fee to participate in the hazardous recreational activity. Cal. Gov't Code 831.7(c)(2). This exception to immunity would not apply since the City does not intend to charge a fee to scuba divers to use the wreck site.

The third exception to the "hazardous recreational activity" immunity occurs where injury is caused by "the negligent failure of the public entity to properly construct or maintain in good repair any structure, . . . or substantial work of improvement utilized in the hazardous recreational activity." Cal. Gov't Code 831.7(c)(3). The "Project Yukon" literature, attached to the Manager's Report dated July 23, 1998, describes the steps taken to prepare the *Yukon* for use by scuba divers.[2] Based on this description, it appears the preparation of the ship for scuba divers is reasonable and therefore not negligent. However, to ensure that all reasonable steps are taken in preparing the *Yukon*, it is strongly suggested that the project coordinator contact other entities that have sunk ships for use by scuba divers to determine what safety steps they used in preparing their ships. This information should be documented and saved to be available in case of a lawsuit.

Immunity is also lost, under the third exception, for negligent maintenance of a structure or work of improvement used in the hazardous recreational activity. The Manager's Report notes, in essence, that no maintenance of the *Yukon*, once sunk, will be undertaken. Assuming that this is the standard of care used by the other entities that have sunk ships for use by scuba divers, then this lack of maintenance should not be considered negligent. It should be a reasonable presumption by scuba divers that a sunken ship will not be maintained. In an abundance of caution, it is suggested that the buoys marking the *Yukon* should also have a sign warning: "Wreck Site Not Maintained, Dive at Your Own Risk" or similar language. Again, it is strongly suggested that the project coordinator contact other entities that have sunk ships for use by scuba divers to verify that it is the standard of care not to provide maintenance of the ships once they are sunk. This information should be documented and saved to be available in case of a lawsuit.

The fourth exception to the "hazardous recreational activity" immunity occurs when the public entity "recklessly or with gross negligence promoted the participation . . . in the hazardous recreational activity." However, "promotional literature or a public announcement or advertisement which merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion." Cal. Gov't Code 831.7(c)(4). As long as any advertisements, promotional literature, or public announcements merely describe the available facilities and services on the property this exception to the "hazardous recreational activity" immunity should not apply. Again, in an abundance of caution,

it is suggested that any advertisements, promotional literature, or public announcements by the City of San Diego concerning diving the *Yukon* should include language to the effect that: "As with any submerged wreck, no lifeguards monitor divers or the wreck site and the wreck is not maintained by the City of San Diego. Divers dive at their own risk."

The fifth exception to the "hazardous recreational activity" immunity occurs where injury is caused by "an act of gross negligence by a public entity or a public employee." Cal. Gov't Code 831.7(c)(5). "Gross negligence" is "the want of even scant care or an extreme departure from the ordinary standard of conduct." *Decker,* 209 Cal. App. 3d at 358. The only likely situation for a plaintiff to raise a claim of "gross negligence" involving the *Yukon* would be a rescue situation. A review of cases involving claims of "gross negligence" in ocean rescue situations of persons participating in hazardous recreational activities demonstrates that it is extremely difficult for a plaintiff to prove "gross negligence." *Decker,* 209 Cal. App. 3d at 358-62; *City of Santa Cruz v. Superior Court,* 198 Cal. App. 3d 999, 1007 (1988). It is very doubtful a situation could arise regarding the *Yukon* in which the City would be found to be "grossly negligent."

3. Application of the defense of "assumption of the risk" to wreck diving.

In addition to the "hazardous recreational activity" immunity, the defense of "assumption of the risk" should protect the City from liability for injuries to scuba divers diving the *Yukon*. In general, absent an immunity, such as discussed above, a public entity can be liable for an injury caused by a "dangerous condition" of its property which it either created or had notice of. Cal. Gov't Code 835. However, under the defense of "primary assumption of the risk," the California Supreme Court has recognized that in the sports setting, "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself" and a property owner has "no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself" although there is "a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." *Knight v. Jewett,* 3 Cal. 4th 296, 315-16, (1992).

In applying this concept, that a property owner supplying a facility used in a sports activity is not liable for an injury inherent in a sport itself, the courts have ruled that ski resorts are not liable for injuries from collisions with natural objects or plainly visible man made objects (*Connelly v. Mammoth Mountain Ski Area,* 39 Cal. App. 4th 8 (1995)) and that white water rafting companies are not liable for injuries to a plaintiff thrown into an aluminum portion of a raft where the raft was the standard and common equipment used by the industry (*Ferrari v. Grand Canyon Dories,* 32 Cal. App. 4th 248 (1995)). However, the courts have also ruled that where property owners have increased the risks inherent in the sport they can be liable, such as where a ski resort placed a sign in a ski run that was difficult to see and a skier collided with it (*Van Dyke v. S.K.I. LTD.* 67 Cal. App. 4th 1310 (1998)) and where a motocross bicycle race course designed a jump that was not typical for the industry and created an extreme risk of injury (*Branco v. Kearny Moto Park, Inc.,* 37 Cal. App. 4th 184 (1995)).

Under the "assumption of the risk" defense, the City would not be liable for injuries from inherent dangers of scuba diving including, but not limited to, running out of air, ruptured lungs, decompression sickness (the bends), or other dangers enumerated in diver training manuals such as The Professional Association of Diving Instructors [PADI] *Open Water Dive Manual*.

Additional inherent dangers of wreck diving should include the possibility of becoming lost, disoriented, or stuck, the inability to immediately head to the surface in an emergency, and the possibility of entanglement or injury from interior protrusions.

The City should not be liable for these additional inherent dangers of wreck diving assuming the preparation of the *Yukon* does not increase the inherent risks involved. The "Project Yukon" literature, attached to the Manager's Report dated July 23, 1998, describes the steps taken to prepare the *Yukon* for use by scuba divers (see footnote 2, supra). Based on this description, it appears the preparation of the ship for scuba divers decreases, rather than increases, these inherent risks. However, to ensure that the *Yukon* is prepared in accordance with the standard practice of preparing ships for use by scuba divers, it is strongly suggested that the project coordinator contact other entities that have sunk ships for use by scuba divers to determine what safety steps they used in preparing their ships. This information should be documented and saved to be available in case of a lawsuit.

CONCLUSION

The City of San Diego should be immune from liability for personal injury to scuba divers diving the *Yukon*. Scuba diving is a "hazardous recreational activity" as defined by California Government Code section 831.7. Section 831.7 immunizes public entities from liability for personal injury occurring to persons participating in "hazardous recreational activities." Although there are five exceptions to the immunity provisions, it does not appear any of the exceptions will apply. First, there are no hidden dangers in diving the *Yukon* which are not inherently a part of the dangers of scuba diving a wreck. Second, the City will not be charging a fee to dive the *Yukon*. Third, the described preparation of the *Yukon* for scuba divers appears to be reasonable and the lack of maintenance once submerged should be a reasonable assumption by divers and is the accepted standard for submerged wrecks. Fourth, there is no reckless or gross negligence in promoting diving the *Yukon* as long as any advertisements, promotional literature, or public announcements by the City of San Diego merely describe the available facilities and services. And fifth, it is very doubtful the City could be found to be "grossly negligent" in conducting rescue operations. Additionally, the defense of "assumption of the risk" should prevent the City from being liable for injuries resulting from the inherent risks of scuba diving and in particular wreck diving.

It is suggested that other entities that have sunk ships for use by scuba divers be contacted to verify (1) the reasonableness of the preparation procedures and (2) that no maintenance is performed once submerged. It is also suggested, in an abundance of caution, that the buoys marking the *Yukon*, as well as any promotional literature, contain language to the effect that: "No lifeguards monitor divers or the wreck site, the wreck is not maintained by the City of San Diego, and divers dive at their own risk."

CASEY GWINN, City Attorney

By
Sim von Kalinowski
Deputy City Attorney

SvK:db:(x043.2)
ML-99-5