DATE: February 4, 1986
TO: Ross McCollum, Financial Management Department
FROM: City Attorney
SUBJECT: Potential Liability - Child Care Facilities - Torrey Pines Science Park

In November, 1985, the Public Facilities and Recreation Committee discussed the concept of leasing a portion of Lot 10 in the Torrey Pines Science Park to the Torrey Pines Child Care Consortium for the development and operation of a child care center for approximately 150 children. In connection with the discussion it was stated that the site is within a "crash hazard zone" designated by the United States Government for Miramar Naval Air Station. It was also pointed out that the site is within the community noise equivalent level (CNEL) contours established for Miramar Naval Air Station. The City Manager and this office were requested to review the "crash hazard zone" issue and related matters and report back to the Committee.

The site in question is within the least hazardous of the "crash hazard zones" established by the Navy. Also, it is my understanding that in the years since the "crash hazard zones" were established, all of the crashes involving Miramar Naval Air Station planes have occurred outside of all of the "crash hazard zones." The "crash hazard zones" involve thousands of acres of property much of which is in private ownership. The Federal Government has the legal authority to condemn any property which it requires to protect the population from crash hazards adjacent to airfields such as Miramar. The site in question is approximately four miles from the landing area. The Navy apparently has concluded that it is not necessary to acquire property so far from the airfield and has taken no action to do so.

Taking into consideration the fact that the subject property is near the edge of the least hazardous crash zone and the fact that crashes seldom occur, the statistical chance of the subject site being struck by a falling aircraft appears so remote as to be comparatively negligible.

However, if the site had been developed with a child care center and if such an unfortunate event were to occur, the City would likely be named as a defendant in the litigation that would follow.

The City, in such an event, would probably be able to avoid any actual liability for several reasons. The Federal Government has been held liable under the Federal Tort Claims Act in cases involving crashes of planes into buildings or structures. Such liability has been based either on the theory that the pilot was negligent in the operation of the plane or that there was negligence in the maintenance of the aircraft. Preferred Ins. Co. v. United States, 222 F2d 942, cert den 350 US 837, 100 L.Ed 747, 76 S Ct 74, reh den 351 US 990, 100 L.Ed 1502, 76 S Ct 1044, supra Sec. 5(a), Ninth Cir. (1955, CA9 Cal).

California Government Code, Section 830, defines what constitutes a dangerous condition of public property as follows:

> "Dangerous condition" means 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.

Furthermore, Section 830.2 states that the public entity which owns the property in question is not liable if the risk of injury is less than substantial.

> Sec. 830.2.
>
> A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

Also, the public entity is not liable if it acts in a reasonable manner in relationship to the known risk.

> Sec. 835.4
>
> (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission
>
> that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined 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 taking alternative action that would not create the risk of injury or of protecting against

the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 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.

It would appear, on balance, that there is little likelihood that a successful suit could be brought against the City of San Diego due to the allowance of the construction and operation of a child care center at the location in question. The final determination would, of course, be left to the court of law.

Furthermore, it seems highly unlikely that the Federal Government, by merely establishing designated "crash hazard zones," could, in effect, shift liability from itself to cities which allow such properties to be utilized in conformance with applicable zoning and land use regulations. In addition any lease of the subject site would contain provisions for appropriate liability insurance which would name both the lessee and the City as insureds.

In conclusion, it does not appear that the City would incur substantial potential liability if it allows a portion of Lot 10 in the Torrey Pines Science Park to be utilized as a child care center.

JOHN W. WITT, City Attorney
By
Harold O. Valderhaug
Deputy City Attorney

HOV:ps:754(x043.2)
ML-86-10