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An Overview of Dangerous Condition of Public Property Liability in California

There has been a sharp increase in the number of cases alleging liability for accidents that have occurred on property owned or controlled by a public entity. Because of this, it is important that all public officials and employees understand the basic elements and defenses relating to a cause of action for Dangerous Condition of Public Property. This article will give you an overview of the elements needed to establish a claim for dangerous condition of public property, as well as common immunities that can be asserted and practical advice to defend against such claims and protect your entity from receiving such claims in the first place.

Elements of a Dangerous Condition Cause of Action

Pursuant to the applicable Government Code sections and case law, in order to prevail on a claim for a dangerous condition of public property, a Plaintiff must establish the following:

1. The public entity owned or controlled the property;
2. The property was in a "dangerous condition" at the time of the injury;
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;
4. The negligent or wrongful conduct of the public entity's employees acting with the scope of employment created the dangerous condition **or** the public entity had notice of the dangerous condition for a long enough time to have protected against it and did not;
5. Plaintiff was harmed; and
6. The dangerous condition was a substantial factor in causing Plaintiff's harm. (Gov. Code §835; CACI No. 1100; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 758.)

Understanding Public Property

"Property of a public entity" or "public property" are defined as "real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity, but are not owned or

controlled by the public entity." (Government Code section 830(c).) Thus, for example, property outside city limits can be public property if the city owns or controls it. Similarly, property within the city's limits might not be considered property of an entity if it is not owned or controlled by the city.

In order to determine if a public entity has sufficient control over a particular property, the key issue to look at is whether or not the public entity had the "power to prevent, remedy or guard against the dangerous condition." (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 990.) The City may be subject to liability even if it does not own the property but maintains or repairs the property, for example.

How is Dangerous Condition Defined?

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." (Gov. Code § 830(a)). A condition is not dangerous, if a 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." (Gov. Code § 830.2.)

Substantial or Trivial?

While some conditions appear obviously dangerous (a giant sinkhole in the middle of a busy intersection, for example) others may be more difficult to determine (such as a two-inch lift in a section of a sidewalk). In dangerous condition cases involving potholes or uneven sidewalks, whether the alleged dangerous condition is substantial or trivial will often be a hotly litigated issue.

Though courts often refer to this principle as the "trivial defect defense," it is not actually an affirmative defense. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.) Rather, the plaintiff has the burden of proof of establishing that the defect actually caused his injury and was substantial rather than trivial (*Ibid*.).

In determining whether a particular defect is substantial or trivial, "the court should *not* rely solely upon the size of the defect." (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1105 [*emphasis in original*].) "Instead, the court should [also] determine whether there existed any circumstances surrounding the accident which might have

rendered the defect more dangerous than its mere abstract depth would indicate." (*Fielder v. City of Glendale* (2023) 71 Cal.App.3d 719, 732.)

Additional Elements of A Claim Under Government Code Section 835

While many plaintiffs believe that public entities are strictly liable for any defect located on their property, that is simply not the case. Liability will only be found against a public entity if a plaintiff can plead and prove the elements of Government Code section 835 which states: "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." (Gov. Code § 835.)

Therefore, a public entity may be liable for injury proximately caused by a dangerous condition of its property if the entity either negligently created the dangerous condition on its property or had actual or constructive notice of a dangerous condition on its property and had sufficient time to take preventive measures before the injury but failed to do so. The issue of whether a public entity had notice or should have had notice of an alleged dangerous condition is often a contentious issue so it is recommended that public entities have a documented inspection program (discussed more thoroughly below).

Common Causes of Dangerous Condition Liability Cases

Virtually any condition of public property that is causally connected to an injury-causing incident could be found to be a dangerous condition if the proper elements are asserted and proven. Thus, dangerous condition liability has been asserted for such varying conditions as landslides, backed up sewers, crowd control at a 4th of July celebration, the design of park swings, and even a library window that was alleged to be too clean.

However, the most common dangerous condition situations relate to sidewalk lifts, street potholes or lifts, or issues relating to traffic intersections. Because of this, it is important that public entities keep

alert to possible issues on their sidewalks, streets and intersections, lest they find themselves facing significant tort liability.

Protecting Your Public Entity from Dangerous Condition Claims

Because of the immense liability exposure of even a single dangerous condition lawsuit, it is important that public entities take steps, both before and after a suit is filed, to minimize dangerous condition claims.

- **Implement an Inspection Program**: All public entities should consider establishing a system that can help a municipal entity identify and eliminate dangerous conditions **before** an accident occurs not only reducing exposure to dangerous condition liability but making public property safer and more enjoyable in the process. Ideally, an inspection system should include both proactive elements (such as a dedicated inspection team) and reactive elements (such as a complaint call-in center). If the public entity "maintained and operated …an inspection system with due care and did not discover the condition, it will be difficult to establish that the public entity had the actual or constructive notice required to hold that public entity liable." (Gov. Code § 835.2 (b)(2)).
- **Remediate any Dangerous Conditions Identified**: Once you have an inspection system in place, it is important that you also have a system in place to quickly remediate it, thus making your community a better and safer place while also protecting yourself from liability. If a dangerous condition cannot be remediated immediately, remediate as much as possible and place adequate warnings near the condition to warn the public of its dangerous nature (including temporary warnings like spray painting sidewalk lifts), then assign funding and develop a plan to remediate the issue as soon as you are able.
- **Document, Document, Document**: Document all activities related to design, construction, maintenance, repair of any public property or project. This includes documenting with photographs any condition before and after repairs. This will help ensure consistent implementation of your projects, possibly protect you via design immunity (Gov. Code §830.6) and provide better evidence should the case go to trial. It is also important to photograph and document the area of an incident as soon as the public entity receives a claim since property and conditions can change over time. Memories fade, witnesses retire or change jobs. So if it might be important in the future, write it down!
- **Consider Immunities**: There are a few statutory immunities

that a public entity may assert in the right circumstances that will help defend your public entity against dangerous condition liability. It is good practice to keep these immunities in mind before a lawsuit is filed to limit your entities liability in the future. Such immunities include Design Immunity (Gov. Code § 830.6), Sign Immunity ((Gov. Code §§ 830.4 and 830.8), Weather Immunity (Gov. Code § 831), Natural Conditions Immunity (Gov. Code § 831.2), Trail immunity (Gov. Code § 831.4), Hazardous Recreational Activity Immunity (Gov. Code § 831.7), and Dog Park Immunity (Gov. Code § 831.7.5).

- **Notify Your Attorney**: Upon receipt of a dangerous condition claim or complaint, it is important to let your attorneys know right away so that they can gather the information necessary to defend the lawsuit.

Learn How a California Public Law Attorney Can Help

The ways in which a claim for dangerous condition of public property can be asserted are as boundless as a plaintiff attorney's imagination. Because of this, it is important to put systems in place to keep public property in a safe condition and your public entity alert for complaints and claims relating to potential dangerous conditions so that they can be addressed quickly and responsibly. It is also important to alert your attorneys as soon as possible of any claim related to potential dangerous conditions so that they will be able to gather evidence and develop a strategic plan to defend against the claim. Should you have any questions regarding a particular claim, or if you simply want advice on establishing programs to protect yourself from dangerous condition liability, please feel free to contact us.