

TO: Board of Education

FROM: Vincent C. Ewing, General Counsel

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SUBJECT: **Board Member Personal Liability; District Liability**

DATE: April 13, 2015

The Board has requested an analysis of its exposure to liability in light of information it has received concerning the dangerous conditions of District buildings.

SUMMARY: *Board members may be exposed to personal liability if they receive information related to the unsafe condition of school buildings and do not take reasonable steps to repair them. A jury would consider whether the steps the Board took to repair the subject buildings were reasonable. The information contained in the Prime Source memo, the Prime Source reports, and the verbal warnings made to the Board by Prime Source, likely trigger the Board's duty to act to avoid exposing it to personal liability.*

ISSUE: Are the members of the Beverly Hills Unified School District Board ("Board") immune from personal liability in the event of a seismic event that causes death and/or bodily harm to students and staff when (1) the District has been notified that buildings are unsafe and (2) the Board takes steps to secure funding for repairing the buildings?

SHORT ANSWER: Yes, the Board members would retain personal immunity from personal liability if the Board takes steps to secure funding for repairing the buildings.

ISSUE: Is the District at risk of liability under the District's joint power agreement with the City of Beverly Hills related to the City's use of District facilities?

SHORT ANSWER: Yes, the District may be exposed to liability if the District is not able to provide access to and use of District facilities to the City.

- I. Board member exposure to personal liability**
 - a. Field Act**

The Field Act is a statute that establishes seismic safety standards for K-12 public schools. The Field Act requires school districts to take *immediate* remedial steps to make public school buildings safe for school use if the board of a school district receives a report from the Division of State Architect, a licensed structural engineer or a license architect concluding that school buildings are unsafe for use. (Ed. Code Section 17367.) Upon receipt of such a report, the board is required to immediately have prepared an estimate of the cost necessary to make repairs to ensure the buildings meet structural safety standards. (Id.) The board is also required to “establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.” To trigger the Field Act requirements, the report must “include a statement that each of the buildings examined is safe or unsafe for school use.” (Id.)

The Field Act provides that no member of a board shall be held personally liable for injury to persons or damage to property resulting from the fact a school building was determined to be structurally unsafe provided the board initiates action to comply with its obligations pursuant to the Field Act. (Ed. Code Section 17371.) Similarly, the Field Act provides that “[a] licensed structural engineer or licensed architect employed by a board to examine any school building may not be held personally liable for injury to persons or damage to property as a result of the structural inadequacy and failure of a building, provided he/she has exercised normal professional diligence in carrying out his/her functions.” (Id.)

b. Government Code

i. Government Code Section 830.6

In addition to exposure to personal liability under the Field Act, school board members may also be personally liable for injuries caused by an unsafe school building under the Government Code. Government Code Section 830.6 protects board members from personal liability against lawsuits filed for injuries caused by an unsafe condition if the school building was constructed in conformance with plans or a design previously approved by the board or by some other body or employee exercising discretionary authority to give such approval. (Gov’t Code Section 830.6.) If the board is advised that the school building is no longer in conformance with the approved plans or design, the protection against personal liability for the board members shall continue for a reasonable period of time to allow the board to obtain funds for and carry out remedial work necessary to allow the school building to be in conformity with a plan or design approved by the governing board or by some other body or employee exercising discretionary authority to give such approval. (Id.) If sufficient funds are not available to remedy the unsafe condition, the immunity provided by the Government Code shall remain so long as such public entity reasonably attempts to provide adequate warnings of the existence of the condition not conforming to the approved plan or design. (Id.) However, if the board fails to take remedial

steps to make the school building in question safe for school use, the members of the board may lose immunity from personal liability. (Id.)

ii. Government Code Section 840.2

Public employees¹ may also face personally liability under Government Code Section 840.2. It provides a public employee may be liable for injuries caused by a dangerous condition of public property if the plaintiff is able to demonstrate the following:

“The employee had the authority to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (Gov’t Code Section 840.2(b).)

II. Statutory indemnity

While some sections of the Government Code expose public employees to personal liability, the Government Code also provides public employees immunity from personal liability. Specifically, Government Code Section 825 provides that a school district must indemnify a board member or employee for an injury arising out of an act or omission occurring within the scope of their employment with the school district. (Gov’t Code Section 825(a).) The board member must request the indemnity from the school district in writing no less than 10 days before trial. (Id.) The board member must reasonably cooperate in good faith with the defense of the claim. (Id.) Provided the board member is able to meet these conditions, the school board must pay any judgment based thereon or any compromise or settlement of the claim or action to which the school district has agreed. (Id.)

III. District liability

¹ California law does not include a definition of "employee" that applies in all situations under the Education, Government and Labor Codes. The definition of "employee" depends on the context. While given individuals, such as governing board members, may be treated as employees for specific purposes (e.g., board members are treated as employees for purposes of withholding income tax from stipends), they may not be considered employees under the general umbrella of California law. There is no statute stating that board members are employees.

Public entity liability for personal injury is governed by the Government Code, which provides a public entity is liable for injuries caused by a dangerous condition of its property if a plaintiff can demonstrate the following:

“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 employment created the dangerous conditions; 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’t Code Section 835.)

The Government Code defines “dangerous condition” 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.” (Gov’t Code Section 830(a).)

“Where a public entity has actual or constructive notice of a dangerous condition, it has a duty to take reasonable steps to protect the public from the danger even if such dangers are not necessarily created by the entity. [Citations omitted.] When facts disclose such foreseeable circumstances, ‘the question of the reasonableness of a public entity’s action in any [such] particular situation is one of fact for a jury.’” (*Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1475, quoting *Swaner v. City of Santa Monica*, supra, 150 Cal.App.3d 789, 810.)

IV. District liability under the facilities JPA with the City of Beverly Hills²

The District and the City of Beverly Hills (“City”) have a joint power agreement (“Agreement”) regarding the City’s use of District facilities. The term of the Agreement is from July 1, 2012 to June 30, 2016. The Agreement requires the District to make available “all recreational and classroom facilities at the District’s Beverly Hills High School, El Rodeo School, Hawthorne

² The District’s liability and property claims are covered in part by a memorandum of coverage (“MOC”) provided by Southern California Relief, a JPA of which the District is a member. On these facts, the Board should obtain a coverage opinion. Whether a particular loss will be covered will be based on the facts and the applicability of the MOC to them. Under the MOC, the District has a duty to report claims and potential claims when it receives notice of the same.

School, Beverly Vista School, and Horace Mann School” to the City for its use. The Agreement defines “all recreational and classroom facilities” as “including but not limited to athletic fields, play yards and play equipment, gymnasias, locker and shower rooms, swimming pool, tennis courts, classrooms, computer labs, fitness rooms, multipurpose rooms, cafeterias, auditoriums, including the Peters Auditorium and the Salter Theatre, the Science and Technology Center” and future facilities constructed on District property. The Agreement also requires the District to make its libraries available to the City.

The Agreement includes the terms, conditions and obligations to which each party must adhere. Importantly, the City is obligated to pay the District the sum of \$9.7 million annually for the right to use the District’s facilities. Importantly, the Agreement requires the District to maintain its facilities in a safe condition for the City’s use. (Section 2 (I).)

The Agreement includes a “Breach, Default and Remedies” provision outlining the remedies available to the City in the event the District is not able to provide the City access to and use of District facilities. (Section 9.) Failure to provide safe access and use to the City of District facilities would be considered a breach by the District. The Agreement provides the District would have fifteen (15) days from receipt of a written notice by the City documenting the breach to cure the breach. (Section 9(B).) If the District is unable to cure the breach within fifteen (15) days of receiving notice from the City, the Agreement provides the City may seek a \$750 daily deduction from the next payment due to the District for each day the breach remains uncured after notice of the breach is provided by the City. The Agreement also provides that if the City is required to purchase equipment or supplies to properly conduct a schedule City use of District facilities, the City may deduct the cost of such equipment or supplies from the next payment due to the District. (Section 9(F).) The City may also pursue any other remedy available at law or equity to enforce its rights. Neither party shall be deemed to be in default if where failure to perform is caused due to Force Majeure, defined thusly:

“Strikes, lockouts, or labor disputes, acts of God, acts of enemies or hostile governmental action, civil commotion, insurrection, revolution, sabotage, fire or other casualty, or taking of a whole or a portion of the District facilities by condemnation or eminent domain.” (Section 9(E).)

V. Analysis

According to a memo prepared by Prime Source Project Management (“Prime Source”) dated March 10, 2015, the District has “received multiple briefings from staff, structural engineers and geologists regarding the seismic safety and risk related to various buildings on the five BHUSD campuses.” (PS memo, pg. 1.) The District has a significant number of buildings that were constructed in the early 1900’s. According to the District’s structural experts, these buildings

have similar structural systems that have well known endemic weaknesses. (Id.) Consequently, due to the buildings' structural systems, they are "prone to collapse in a significant seismic event. (Id.) The District's experts note that a "significant portion or all of the building(s) can fall down during an earthquake" resulting in "significant loss of life" if the buildings are occupied during the earthquake. (PS memo, pg. 1-2.)

According to a memo dated March 31, 2015 prepared by Prime Source, the District and its Board have also been advised verbally of fire risks, hazardous materials risks and other building code defects related to District buildings. The defects and risks include highly flammable wood structures, outdated electrical wiring, partially inoperable fire sprinkler systems and untrustworthy fire alarm systems that place District staff and students at risk of injury or death. The District has also been advised of risks associated with exposure to asbestos and lead based paint. These conditions would cause significant exposure to health risks for students and District staff during and after an earthquake.

As the Prime Source memo highlights, the District has applied for state funding via the State Seismic Mitigation Program ("SSMP") to repair school buildings. The memo reports the State Division of the State Architect has confirmed that fourteen District buildings "fall into the structural category considered most at risk of collapse. (PS memo, pg. 2.) These findings are documented in Eligibility Evaluation Reports ("Reports") prepared by a structural engineer for each respective building. The Reports were prepared using a modified version of the ASCE 31 Tier 1 evaluation, which is the ASCE 31's least intrusive evaluation method. Tier 1 evaluations rely on qualitative "evaluation statements" or checklists to identify potential deficiencies in structures. These Reports are used to determine whether buildings are eligible to receive the SSMP funding. The Division of State Architect confirmed the identified fourteen District buildings are eligible for SSMP funding. According to the District's Chief Facilities Official, Tim Buresh, after consultation with the Office of Public School Construction (see School Facility Program spreadsheet attached) as of February 24, 2015, \$140 million in SSMP funds remain.

The Prime Source memo concludes as follows:

"The District has been briefed on the investigations, the analysis, the conclusions, and of the various expert opinions regarding the safety and continued use and occupancy of buildings which likely present an increased risk of injury or death in a seismic event. We have encouraged the Board to expeditiously upgrade the buildings which are most likely to be compromised in a seismic event, and where the buildings cannot be expeditiously upgraded to transfer students and staff into temporary housing and to reduce the risk to students and staff." (PS memo, pg. 4.)

SSMP funds are matching funds, so, the District has to offer its funds to secure SSMP funding. There are also bond funds available to remedy the dangerous conditions in the buildings.

Does the Board retain immunity if bond funds are currently available and the Board fails to act? This is a question of fact that would be answered by a jury. If current available bond funds are not sufficient to pay for necessary repairs of unsafe buildings, is the Board required to attempt to accelerate the bond to retain immunity? This is a question of fact that would be answered by a jury.

The Board may be exposed to personal liability if it receives information related to the unsafe status of school buildings and does not take reasonable steps to repair the unsafe buildings. The Board retains immunity from personal liability under the Government Code if it takes reasonable steps to repair the unsafe buildings. Again, whether the Board took reasonable steps is a question of fact that would be answered by a jury.

As mentioned, there is no case law to provide clear guidance on what are reasonable steps. If the District and its Board members were sued, “reasonableness” is a question of fact that would be determined by a jury. A jury could find liability because the buildings are unsafe and the “affluent” District and its Board members knew of this and took no, or limited (i.e., SSMP applications), action to secure available funds.

Government Code Section 825 provides that the District would have to indemnify individual Board members if they were found liable. The District (as opposed to Board members) could be on the hook for a significant judgment if no action is taken to remedy a dangerous condition when funds are available.

Similarly, is the District liable for injuries caused by the condition of the District’s unsafe buildings? Where the District has constructive notice of unsafe conditions that may result in injuries and death has the District taken reasonable steps to repair the condition of the unsafe buildings? The “reasonableness” of the District’s actions is a question of fact for a jury to determine.

The determination of whether the District might be liable for damages to the City under the terms of the Agreement due to the District’s inability to provide access to and use of District facilities due to unsafe conditions is a question of fact. The District has received constructive notice of the unsafe condition of several of its buildings. Some of these unsafe conditions, like damage due to an earthquake and fire, arguably, may be excused under the *force majeure* exception. However, they may **not** be excused under the *force majeure* exception due to the District’s notice of them.

Experts would have to determine whether damage resulting from an earthquake or fire was caused by the District's failure to act or whether the damage would have occurred irrespective of the buildings' conditions. A jury would have to determine whether the District took reasonable steps to repair the unsafe conditions after receiving constructive notice.

There are also unsafe conditions, such as exposure to asbestos and lead paint, which do not appear to fall under the Agreement's *force majeure* exception. To the extent the District is unable to provide access to and use of District facilities to the City due to these unsafe conditions that are not covered by the *force majeure* exception would likely result in exposure to damages claims by the City.

The District may also face exposure to damages claims by the City if the District takes steps to repair the unsafe conditions resulting in a loss of access and use of District facilities by the City. To the extent possible, the District could plan and prioritize building repairs in such a way that would minimize or eliminate this exposure.

VI. Conclusion

While it is likely the fourteen District buildings would qualify as "unsafe" for Field Act purposes, the Reports are likely not sufficient to trigger the District's obligations to act under the Field Act. The Field Act clearly provides that a report prepared by a structural engineer must include a statement for each building examined concluding whether the building is "safe or unsafe for school use." (Ed. Code Section 17367.) The Reports do not contain such. Accordingly, the District's duty to act under the Field Act has not been triggered. So, Board members are not subject to personal liability under the Field Act.

But, the information contained in the Prime Source memo along with the information contained in the Reports and the verbal representations and warnings made to the Board likely triggers the District's and the Board's duty to act to avoid exposing the Board to personal liability under the Government Code. Board members may be exposed to personal liability if they receive information related to the unsafe status of school buildings and do not take reasonable steps to repair the unsafe buildings. Board members retain immunity from personal liability under the Government Code if they take reasonable steps to repair the unsafe buildings. As noted above, "reasonableness" is a question of fact that would be determined by a jury. A jury would have to consider whether the steps the District and the Board took to repair the District's unsafe buildings were reasonable in light of the information provided to the District.

Although there is no case law or statutory guidance on what qualifies as reasonable steps, authorizing the preparation of the Reports in support of the District's efforts to secure SSMP funding to repair District buildings along with the District's application for such funding may

qualify as reasonable steps and could protect Board members from exposure to personal liability under the Government Code.

In addition to applying for SSMP funding to repair unsafe District buildings, reasonable steps may also include using available Measure E funds to repair the District's unsafe buildings. To the extent current available Measure E funds are not sufficient, reasonable steps may also include attempting to accelerate the issuance of Measure E funds to fund the required repairs.

Based on the information provided to the Board, the District may also consider housing District students and staff in portable buildings on a temporary basis while the District continues to seek funding and develops a plan to repair the District's unsafe buildings. The District likely has sufficient funding available via its Measure E bonds to pay for the transfer of students and staff to portable buildings. Implementation of a portable building plan would also likely be viewed as reasonable steps taken by the Board to remedy unsafe building conditions resulting in the preservation of personal immunity for Board members.

Again, the Board is required to take reasonable steps, like the ones discussed above, to retain its immunity under the Government Code from personal liability resulting from injuries sustained from unsafe District buildings.

Board members would also be granted immunity from personal liability for injuries occurring due to the condition of District buildings as long as the Board members satisfy the required conditions under Government Code Section 825 (i.e., District's duty to indemnify Board members).

The District and its Board have been given constructive notice of unsafe conditions of several buildings. If a plaintiff filed a lawsuit alleging he/she suffered damage resulting from the unsafe condition of the District's buildings, a jury would consider the following:

- Whether the District took reasonable steps to repair the buildings after receiving constructive notice of the buildings' unsafe conditions.
- Whether applying for SSMP funding alone qualifies as a reasonable step protecting the District from liability.
- Whether it would be reasonable to expect the District to shut down the unsafe buildings and move students and staff to temporary buildings.
- Whether attempting to accelerate the Measure E funds would be considered an expected reasonable step to repair the unsafe buildings.
- Whether the District took enough steps within a reasonable amount of time after being notified of the unsafe condition of the District's buildings.

Although District Board members *may* not be exposed to personal liability under the Field Act or the Government Code under the current set of facts, a plaintiff may still file a lawsuit against the District and Board members personally.

Finally, although the District qualifies for SSMP funding, there is no guarantee the District will be selected as an SSMP funding recipient. *However, the District's obligation to develop a plan to address the unsafe conditions of its buildings remains.*