



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: November 18, 2014

Agenda Item 9A
Approvals:
City Manager [Signature]
Dept. Head [Signature]
Attorney [Signature]
Finance [Signature]

Department: Public Works / Engineering
Prepared By: Tom Bonigut, Assistant City Engineer TB

Subject: *APPROVE CITY POLICY No. 801-2 TITLED "DESIGN IMMUNITY" AND ADOPT ORDINANCE RELATING TO APPROVAL OF DESIGNS.*

Fiscal Impact: None.

Summary: This item is to approve a City Policy and adopt an Ordinance to help ensure that the City maintains design immunity protection as discussed below.

Discussion: State law provides public agencies with a design immunity defense for any public works projects designed and constructed by the public agency, provided that the design was approved in advance of the construction by the agency's legislative body or by an employee authorized by the legislative body to give such design approval. The purpose of the design immunity is to protect local governments by preventing a jury from second-guessing the legislative body's decision to adopt a design.

In San Clemente, when projects are authorized to be advertised or bids are awarded by the City Council, language is typically included in the Council action to approve plans and specifications. There are situations where the City Council does not approve plans and specifications, such as small projects or change orders during construction. To better protect the City from potential design defect claims and preserve its design immunity protection afforded by State law, staff recommends that the City Council formally delegate to the Public Works Director/City Engineer, or his or her designee, the authority to approve plans and designs for all public works/improvement and subdivision improvement projects. The attached proposed design immunity policy and Ordinance are based on suggested best practices by the California Joint Powers Insurance Authority (JPIA) and have been reviewed by the City Attorney as well as legal counsel designated by the JPIA to assist the City with defense of claims.

It is important to note that the proposed policy and Ordinance do not in any way impact, affect or change the City Council's discretion and authority to approve projects and appropriate project funding pursuant to other applicable City policies and procedures. The policy and Ordinance also do not circumvent other established project design review and approval processes (e.g. design review and approval for conformance with discretionary permit requirements, etc.). The proposed policy and Ordinance are narrowly limited to approval of project designs for the purpose of establishing and maintaining design immunity protection pursuant to State law.

Recommended

Action: STAFF RECOMMENDS THAT the City Council:

1. Approve and adopt City Policy No. 801-2 titled "Design Immunity;" and
2. Adopt Ordinance No. _____ titled AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, ESTABLISHING A NEW SECTION 2.20.040 OF THE MUNICIPAL CODE OF THE CITY OF SAN CLEMENTE RELATING TO APPROVAL OF DESIGNS.

Attachment: 1. Proposed City Policy No. 801-2.
2. Proposed Ordinance.

Notification: None.

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POLICY AND PROCEDURE

Subject: Design Immunity	Index: Public Works & Utilities Number: 801-2
Effective Date: November 18, 2014	Prepared By: Public Works Dept.
Supersedes: N/A	Approved By:

1.0 PURPOSE:

It is the purpose of this policy to minimize the City of San Clemente's liability exposure related to design and construction of public improvement projects by ensuring that the City establishes and maintains design immunity as provided by State law.

2.0 ORGANIZATION AFFECTED:

All City Departments that engage in design and construction of public improvement projects.

3.0 REFERENCES:

- 3.1 California Government Code Section 830.6.
- 3.2 San Clemente Municipal Code Sections 2.20.040 and 16.04.020.

4.0 POLICY:

4.1 It is the desire of the City of San Clemente to minimize its liability exposure related to design and construction of public improvement projects by establishing procedures to ensure that the City establishes and maintains design immunity protection afforded by State law. To invoke design immunity protection, the City must establish the following three elements: 1) discretionary approval of the design before construction; 2) substantial evidence supporting reasonableness of the design; and 3) a causal relationship between the design and the accident/injury claimed against the City. This policy provides procedures to support and establish these design immunity elements.

4.2 This policy does not in any way impact, affect or change the City Council's discretion and authority to approve projects and appropriate project

funding pursuant to other applicable City policies and procedures. This policy also does not circumvent other established project design review and approval processes (e.g. design review and approval for conformance with discretionary permit requirements, etc.). This policy is narrowly limited to approval of project designs for the purpose of establishing and maintaining design immunity.

5.0 DISCRETIONARY DESIGN APPROVAL:

- 5.1 According to State law, discretionary approval of a design before construction can be established via approval of the design by the legislative body or another body or employee that has been given discretionary authority to approve the design.
- 5.2 To ensure and establish discretionary approval of designs, the Public Works Director/City Engineer (or his/her designee provided that such designee holds a valid registration as a Professional Engineer in the State of California) shall be delegated via the San Clemente Municipal Code the authority to exercise discretionary approval of designs and any design amendments or addenda for public improvement or subdivision improvement projects.
- 5.3 The designs shall be signed by the Public Works Director/City Engineer or his/her designee.
- 5.4 Public improvement project construction contracts must still be approved in accordance with the City's purchasing policy for public works contracts. In addition to the Public Works Director/City Engineer approval of designs, all reports to the City Council for award of contracts to construct public improvement projects shall include a recommendation for City Council approval of the design similar to the following:

Staff recommends that the City Council approve the design, plans and specifications for the <insert name of project, and City project number if applicable>.
- 5.5 After a project design is approved and during construction of a project, there may be changed circumstances or conditions that result in a material or significant change to the approved project design. Any significant or material construction-phase project design changes must also be formally approved, and the Public Works Director/City Engineer, or his/her designee, is also delegated the authority to exercise discretionary design approval for material or significant design changes that occur during project construction.
 - 5.5.1 What constitutes a significant or material design change will depend on project-specific factors, and the proposed change(s) must be compared against the originally-approved design to determine if the change is material or significant. For example, an approved roadway project includes re-striping an existing standard

crosswalk, but during construction it has been determined that adding additional "ladder" striping to the crosswalk would improve its visibility and the additional striping is in compliance with applicable design requirements and would not adversely impact roadway users. Such a change shall be indicated on the project record ("as-built") drawings but does not need formal discretionary design approval (although this change could be formally approved if desired). On the other hand, if the crosswalk is deleted from the project, or if a new crosswalk is added to the project but was not included in the original design, such changes would be materially different than the originally-approved design and thus require discretionary design approval.

5.5.2 Any material changes to the originally-approved project design that were made and approved during project construction shall be briefly explained (with specific mention that such changes were approved by the Public Works Director/City Engineer or his/her designee) in the report presented to the City Council for acceptance of the completed project. Depending on the nature of the significant change(s) and City Council intent for the project, potential significant changes may need to be presented and approved by the City Council before they are implemented.

5.6 Whether or not there are any changes to the approved design during construction of the project, City staff shall practice sound construction project management, inspection and documentation to ensure that the completed project conforms to the approved project design, including any approved construction-phase design changes.

6.0 EVIDENCE OF THE REASONABLENESS OF THE DESIGN:

6.1 This element is satisfied with any substantial evidence that the design could have been adopted by a reasonable legislative body or public employee. The courts have generally found that proper discretionary approval of the design constitutes sufficient substantial evidence. However, to clearly establish the reasonableness of a design, the City shall document design choices in as much detail as practicable by taking appropriate actions documented in the project file, which may include the following:

6.1.1 Document key design elements that were considered in the project design, including those that were rejected (and reason for rejection); and

6.1.2 Document whether the design satisfies applicable statutes, codes, standards or guidelines, whether there are any deviations from such, and explanations for any deviations.

- 6.2 For project designs prepared by consultants hired by the City, the City's approval of such designs shall be considered an acceptance of the designs as being in general conformance with applicable statutes, codes, standards or guidelines. However, the responsibility for the completeness, accuracy and conformance of the designs resides with the Engineer and Engineering Firm of Record that prepared the design. For designs prepared by consultants for the City, in addition to approving the design as discussed in Section 6.0, the City shall apply an "acceptance" stamp to any plans or specifications similar to the following:

Acceptance of Plans/Specifications

The City of San Clemente hereby accepts these plans/specifications for construction, as being in general compliance with applicable statutes, codes, standards or guidelines. Responsibility for the completeness and accuracy of the plans/specifications and related designs, and conformance to applicable statutes, codes, standards or guidelines, resides with the Engineer and Engineering Firm of Record.

(Signed and dated by authorized City staff)

- 6.3 Design immunity is not perpetual, and the City may lose design immunity protection once the City has received actual or constructive notice that the design has caused a dangerous condition of public property due to changed physical conditions. The City will use best efforts to review whether accidents or claims that have occurred would constitute notice of a changed physical condition that have rendered a design as dangerous. If the City receives such notice, it shall act reasonably to correct or minimize the identified dangerous condition. Even absent any accidents or claims, City staff shall, if they become aware of a potential changed condition in the course of their duties, evaluate the condition to determine if it has or might cause a dangerous condition and if so, take reasonable steps to correct or minimize the dangerous condition. When addressing such conditions, staff shall adhere to existing applicable City policies regarding purchasing, contracting, etc.

7.0 CASUAL RELATIONSHIP BETWEEN THE DESIGN AND ACCIDENT:

In order to support a design immunity defense, there must be adequate proof that the feature producing the injury was part of the project design. Proper documentation of a project's design basis and complete and correct designs as noted in the preceding procedures will support the determination of a causal relationship.

8.0 DEFINITIONS:

- 8.1 Design: a plan, drawing, sketch or specifications developed to depict or describe the function or workings of an improvement project before it is constructed.
- 8.2 Facility: any plant, building, structure, ground facility, utility system, real property, streets and highways or other public work improvement.
- 8.3 Public improvement: erection, construction, reconstruction, alteration, renovation, demolition, improvement, and repair work involving any facility owned, leased, or operated by the City of San Clemente. A public improvement project does not include maintenance work.
- 8.4 Subdivision improvement: improvements associated with a subdivision as more fully defined in Section 16.04.020 of the San Clemente Municipal Code.
- 8.5 Maintenance: routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes; minor repainting; resurfacing of streets and highways at less than one inch; landscape maintenance (including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems); and work performed to keep, operate, and maintain City-owned water, sanitary sewer, storm drainage, and communications systems.

ORDINANCE NO.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN CLEMENTE, CALIFORNIA, ESTABLISHING A NEW SECTION 2.20.040 OF THE MUNICIPAL CODE OF THE CITY OF SAN CLEMENTE RELATING TO APPROVAL OF DESIGNS

WHEREAS, California Government Code Section 830.6 provides that neither a public entity nor a public employee is liable for an injury caused by the plan or design of a construction of, or an improvement to, public property under certain conditions; and

WHEREAS, such conditions are that such plan or design must be approved in advance of the construction or improvement by the legislative body of the public entity, or by some other body or employee exercising discretionary authority to give such approval; and

WHEREAS, in order to preserve the City's design immunity protection under Section 830.6, the City Council now desires to confer upon and delegate the authority to approve plans and designs for all of the City's public improvement projects and subdivision improvement projects to the Public Works Director/City Engineer, or his or her designee, and memorialize this fact by way of this Ordinance; and

WHEREAS, such delegation of design approval authority does not change the City Council's discretion and authority to approve projects and appropriate project funding pursuant to other applicable City policies, procedures, and codes, or circumvent other established project design review and approval processes (e.g. design review and approval for conformance with discretionary permit requirements).

NOW, THEREFORE, the City Council of the City of San Clemente, California, hereby ordains as follows:

Section 1: Section 2.20.040 is hereby added to the San Clemente Municipal Code to read in its entirety as follows:

2.20.040. Approval of Plans and Designs

The Public Works Director/City Engineer (or his/her designee provided that such designee holds a valid registration as a Professional Engineer in the State of California) is delegated the authority to exercise discretionary approval of plans, designs and any design amendments or addenda for public improvement or

subdivision improvement projects. The plans and designs shall be signed by the Public Works Director/City Engineer or his/her designee.

Section 2: The foregoing is declarative of existing law.

Section 3: The City Clerk shall certify to the passage of this ordinance and cause the same to be published as required by law, and the same shall take effect as provided by law.

APPROVED AND ADOPTED this _____ day of _____, _____.

ATTEST:

City Clerk of the City of
San Clemente, California

Mayor of the City of San
Clemente, California

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF SAN CLEMENTE)

I, **JOANNE BAADE**, City Clerk of the City of San Clemente, California, hereby certify that Ordinance No. _____ having been regularly introduced at the meeting of _____, was again introduced, the reading in full thereof unanimously waived, and duly passed and adopted at a regular meeting of the City Council held on the ____ day of _____, _____, and said ordinance was adopted by the following vote:

AYES:

NOES:

ABSENT:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of San Clemente, California, this ____ day of _____, _____.

CITY CLERK of the City of
San Clemente, California

APPROVED AS TO FORM:

CITY ATTORNEY