MEMORANDUM
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To: Mayor and City Council

From: Tom Cupani, Assistant City Attorney

Through: Dan Atchison, City Attorney

Date: May 10, 2016

Subject: Immunity Provision in Grading Ordinance

On May 23, 2016 Council will consider second reading of *Engrossed* Ordinance Bill No. 6-16, the "grading ordinance." Both Council and the Planning Commission have received comments suggesting that proposed SRC 82.010 be removed from the ordinance. The section purports to limit the City's liability for injury that may result from actions that arise out of the ordinance.

Proposed SRC section 82.010 states:

> "Nothing contained in this Chapter is intended to be nor shall be construed to create or form the basis for any claim, action, or liability against the City, its officers, employees or agents for any injury or damage resulting from the failure of responsible parties to comply with the provisions of this Chapter, or by reason or in consequence of any inspection, notice, order, certificate, permission, or approval authorized, issued, or done in connection with the implementation or enforcement of this Chapter, or by reason of any action or inaction on the part of the City related in any manner to the enforcement of this Chapter by its officers, employees, or agents. Nothing in this Chapter is intended to nor shall be construed to create a standard of care or impose a duty upon the City."

The comments describe the section as "unnecessary overkill," "confusing," "repugnant to the values of the Oregon State Bar," and "a disservice to the public." These comments are incorrect, misleading, and if accepted by the City would likely lead to additional litigation, and associated expense, for the City. Below is a brief summary of discretionary immunity for public bodies in Oregon, and an explanation of the section and why it should remain in the ordinance.

Discretionary Immunity

Public bodies are immune from liability for "[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." ORS 30.265(6)(c) (subsection numbering effective January 1, 2012; *see* 2011 Or Laws ch 270, §1). This provision is vigorously litigated under the Oregon Tort Claims Act

(OTCA) (ORS 30.260–30.300) and continues to be a source of confusion for lawyers, judges, and litigants, because the Oregon Supreme Court has not adopted a bright-line test for distinguishing discretionary functions (when governmental immunity can apply) from ministerial functions (when the government may not be immune). *See Smith v. Cooper*, 256 Or 485 (1970). Cases that appear similar on their facts may reach different results. *Compare Tozer v. Eugene*, 115 Or App 464 (no immunity for failing to maintain street trees), *with Bakr v. Elliott*, 125 Or App 1 (1993) (city immune from allegation of failure to maintain street trees).

Performance of a governmental function or duty must satisfy three criteria to qualify for discretionary immunity to apply:

(1) It must involve an exercise of judgment;

(2) It must involve public policy as opposed to day-to-day decisions or duties; and

(3) The policy choice must be exercised by someone who has the responsibility or authority to make it, either directly or by delegation.

Sande v. City of Portland, 185 Or App 262, 268–269 (2002).

More succinctly, the Oregon Supreme Court has said that conduct is discretionary "if the decision is the result of a choice among competing policy considerations, made at the appropriate level of government." *Garrison v. Deschutes County*, 334 Or 264, 273 (2002). These simple criteria have proved rather difficult to apply in practice.

For discretionary function immunity to apply, the public body must actually have made a choice. The policy choice cannot be merely hypothetical. Thus, in *Sande*, the plaintiff alleged that her injury was the result of a police detective instructing her neighbor not to inform her or others of prior similar incidents. The detective denied telling the neighbor not to tell others but opined that on occasion good police practice might call for withholding information. The court of appeals held that this evidence established that the detective could have made a policy call, not that she did make one. In the absence of an actual exercise of policy judgment, discretionary immunity is not applicable. "As a matter of law, discretionary immunity requires evidence not only *that* a decision was made, but *how* a decision was made." *Sande*, 185 Or App at 270.

In general, for discretionary function immunity to apply, the policy choice must be made by a supervisor or policymaking body. *Mosley v. Portland Sch. Dist. No. 1J*, 315 Or 85, 92 (1992). Such policy discretion is more likely to be found at the top of an organization, but the emphasis is on whether the decision really is one of policy, not on the level of the decision-maker's office.

Application of Discretionary Immunity to the Proposed Ordinance

Although a successful defense can often be had by way discretionary immunity, it is often a time-consuming, expensive proposition without a predictable out-come. Proof to satisfy the essential elements is difficult to come by; documentation to support the decision-making process is missing or non-existent; employees who were involved in the decision have left City employment or their memories may fade over time. Moreover, plaintiffs who bring a lawsuit of this manner—one which seeks to attack the oversight function of the City, often ignore the defense or are unaware of the details of the decision making process and its legislative

background as they are focused on the immediate harm that was done to them in their specific situation.

Proposed SRC 82.010 does not attempt to declare that the City is immune, or purport to bar would-be plaintiffs from suing the City. It simply provides notice to prospective litigants regarding the viability of a potential lawsuit against the City, thereby reducing the number of lawsuits the City has to defend. Thus reiteration in the ordinance of the state standard will result in less, not more, litigation and more effective notice of potential litigant's rights under the law. Additionally, SRC 82.010 establishes that the ordinance does not create a standard of care for the City, thereby avoiding a claim of "negligence per se."[i] Finally, it places people using the grading ordinance on notice that they will be held responsible for their tortuous behavior rather than being able to look to the City as a co-defendant and deep pocket for any resultant damage.

I urge Council to retain SRC 82.010 as it appears in *engrossed* Ordinance Bill No. 6-16, and conduct second reading of the ordinance bill at the May 23, 2016 Council meeting.

[i] "Negligence per se means "Negligence established as a matter of law, so that breach of the duty is not a jury question." In which case, a plaintiff only needs to prove a defendant committed the conduct at issue and that injury to plaintiff resulted. Black's Law Dictionary, pg. 1057, (7th. Ed. 1999).