

TO: James L. App, City Manager
FROM: Doug Monn, Interim Public Works Director
SUBJECT: City Park Merry-Go-Round - Options
DATE: July 19, 2005

Needs: For the City Council to consider the following information/options pertaining to the merry-go-round formerly located in the City Park.

- Facts:**
1. On December 29, 2004, Public Works Staff removed the damaged merry-go-round from the City Park and relocated it to the City yard at Paso Robles Street.
 2. Due to the number of civil suits associated with the Americans with Disabilities Act filed within the City and in response to a Risk Management Evaluation conducted by the California Joint Powers Insurance Authority that suggested the City “step up” its inspection and evaluation of City park equipment, the codes pertaining to this piece of equipment were reviewed.
 3. State Health and Safety Code Sections 115725 through 115750 pertain to playground equipment in Public Parks.
 4. Health and Safety Code Section 115725, specifically requires that playground equipment in public parks shall be at least as protective as the guidelines and criteria continuing in the Handbook for Public Playground Safety published by the American Society for Testing and Materials (ASTM).
 5. Specific improvements required by the Handbook for Public Safety applicable to the existing merry-go-round would be as follows:
 - A. Section 5.1.5 - Merry-go-rounds have a fall zone that extends 6-feet beyond the perimeter of the platform.
 - B. Section 12.2
 1. Handgrips cannot extend beyond the perimeter of the merry-go-round platform.
 2. The underside of the merry-go-round cannot be more than 9 inches above the protective (fall zone) surface.
 3. The rotating platform cannot have any sharp edges.
 4. The speed of rotation cannot exceed 13 feet per second (must be governed).
 - C. Section 10.1 – At least one route within each use zone shall be provided from the perimeter to the all-accessible play components.

- D. Title II of the ADA requires that at least one of every type of "play component" in a park be accessible
6. Upgrading of the merry-go-round to satisfy ADA and H&S code requirements may be possible, but would not be considered for any safety certification from any industry accepted testing body given its age and configuration.

**Analysis
and**

Conclusion: As noted above, it may be possible to "customize" the merry-go-round to satisfy ADA and H&S Code regulations, however, it would not satisfy the third important criteria; certification by a recognized testing body (also see City Attorney's opinion).

Without certification, reinstallation would subject the City to significant financial risk (see attachment from California JPIA). Additionally, the merry-go-round, if retrofitted to meet these standards, would not be the same equipment. The required modifications would completely change the look and use of the merry-go-round.

The cost to modify the playground area to comply with disabled access requirements and fall zones is approximately \$58.00 per square foot. The playground area at the park encompasses approximately 5806 square feet. The resulting cost to modify the entire playground (the ADA would not allow you to address only the merry-go-round) to comply with current health and safety standards is estimated to cost \$336,748.00. The \$336,748.00 would allow replacement of the existing playground equipment with compliant like-for-like equipment.

While City staff can not recollect any liability claims arising out of the use of the merry-go-round in the past, the fact remains that significant exposure exists. Inasmuch as the city has openly discussed the condition of the merry-go round, it has moved beyond "constructive notice" with regards to its potential condition to "active notice". In the case of constructive notice, the plaintiff must prove that the City should have known of the dangerous condition due to a reasonable inspection program. Active notice means that the City is clearly aware of a potentially dangerous condition and failed to act to remedy said condition.

Policy

Reference: State Health and Safety Code Sections 115725 through 115750

Fiscal Impact: It is estimated that it could cost \$10,000.00 to refurbish the merry-go-round to meet present code and an additional \$336,748.00 to address the surrounding playground area to comply with current code requirements. However, the City would still bear a significant liability due to the fact that a refurbished merry-go-round would not have any safety certification from any testing body or insurance carrier. Thus, the City would be exposed to significant financial loss should there be an accident resulting in personal injury.

Options:

- A. Donate the merry-go-round to the Pioneer Museum to be mounted at the historic school house as a static display (render it incapable of turning).
- B. As part of the future City Park Master Plan, evaluate mounting the merry-go-round in the park as a static display to include a plaque describing its history and significance.
- C. Rehabilitate the merry-go-round to comply as close as possible with the requirements of the Health and Safety code, including the modification of the playground area at an approximate cost of \$336,748.00.
- D. Amend, modify, or reject the above options.

Attachments:

- 1) Legal Opinion from Iris Yang, City Attorney
- 2) Risk Assessment, California JPIA
- 3) Health & Safety Code § 115275-115750
- 4) Resolution

DATE June 15, 2005
TO Jim App
FROM Iris Yang; Celestial Cassman
RE Legal Opinion Regarding Non-Compliant Merry-Go-Round in City Park

Background

City Park, a public park in the city of El Paso de Robles (the "City") is the former site of a merry-go-round play structure. The merry-go-round was removed from City Park in December, 2004, due to its damaged condition. The City is currently storing the structure off-site. The merry-go-round is estimated to be at least seventy years old. We understand that the public is fond of the merry-go-round and the City is contemplating the feasibility of reinstalling it. This memorandum evaluates the legal implications of various options for the future of the merry-go-round structure.

Legal Analysis

The City faces two obvious liability risks for older playground equipment such as the merry-go-round in a public park: personal injury claims and the Americans with Disabilities Act (the "Act"). Based on the analysis below, we do not think it is practicable to reinstall the merry-go-round in the park as a working playground component.

1. State Safety Statutes and Regulations

Health and Safety Code section 115725 et seq. sets forth the safety standards for public playground equipment. Pursuant to the regulations promulgated under section 115725 et seq., playground equipment in city parks must be inspected, designed, installed, and maintained in compliance with both the Handbook for Public Playground Safety (the "CPSC Handbook") and the Standard Consumer Safety Performance Specification for Playground Equipment Use (the "ASTM Standards") (collectively, the "Handbooks").¹ 22 Cal. Code Regs. § 65710 et seq.

City staff states that the public would like the merry-go-round reinstalled "as is" because of its historic character. This is not possible because the merry-go-round "as is" violates current law. According to City staff, the structure is severely out of compliance with the applicable standards in many respects.² Although staff opines that the merry-go-round could be modified to meet the

¹ The law provides no "grandfather" provisions exempting equipment of a certain age from safety standards, and clearly requires that older equipment meet modern standards. Further, because the merry-go-round is currently not installed in the park, if there were grandfather provisions, they would not apply to the merry-go-round upon alteration and/or reinstallation.

² We have not inspected the merry-go-round. This analysis is based purely on City staff's summary of the equipment's noncompliance. Based on staff's evaluation, the following modifications are required for the merry-go-round to meet the specifications required by the Handbooks:

- Fall zone must extend 6 feet beyond the perimeter of the platform, which zone does not overlap with the requisite fall zone of any other structure; and
- Handgrips cannot extend beyond the perimeter of the merry-go-round platform; and

standards, such modifications would be costly (around \$20,000), would change the equipment's use and appearance, and most importantly, would not protect the City from liability as further discussed below.

Reinstallation of the merry-go-round may violate applicable safety standards regardless of whether or not the equipment was modified. The law requires that playground equipment be assembled and installed in compliance "with the written instructions of the manufacturer." 22 Cal. Code Regs. § 65730. Given the age of the structure, the City likely does not have written installation instructions from the original manufacturer. Even if the City does have written installation instructions from the manufacturer, those instructions would not comply with current safety standards, as evidenced by the structure's noncompliant design. The original instructions, if any, would not delineate how to modify the equipment to meet modern standards. Therefore, any modified installation would occur in absence of manufacturer instructions and in violation of this legal requirement.

Additionally, even if the City does have the installation instructions from the manufacturer, the equipment must actually be installed by or under the direct supervision of the manufacturer, or the equipment must be inspected and approved by a "Certified Playground Safety Inspector" for compliance with all applicable regulations and standards before it is used.³ *Id.* Based on the structure's age, condition, and the extensive alterations required, it is doubtful a manufacturer or inspector would alter or certify the structure because of their own potential liability.

Pursuant to Government Code § 835, a city is liable for injuries caused by a dangerous condition on public property if the city created or had notice of the condition. Here, violation of an applicable safety standard discussed above is prima facie evidence of a dangerous condition on public property. Further, reinstallation of the merry-go-round by the City constitutes both creation of the dangerous condition and notice to the City of the dangerous condition. While an immunity exists for injury caused by a condition on city property if the City establishes that the act or omission that created the condition was reasonable, any failure to meet mandatory safety standards is deemed unreasonable. Gov't Code § 835.4.

2. Americans With Disabilities Act (42 U.S.C. 12101 et seq.)

Title II of the ADA protects individuals with disabilities from discrimination on the basis of disability in accessing services, programs, or activities.⁴ When an existing playground element or space is altered, the altered element or space must comply with the applicable ADA provisions for new construction. ADA Accessibility Guidelines (hereinafter "ADAAG") § 4.1.6(1)(b) (Federal Register, October 2000). Thus, the merry-go-round cannot be reinstalled or altered if not in compliance with the ADA.

Title II requires that at least one of every type of "play component" in a park be accessible. ADAAG; United States Access Board, available at <http://www.access->

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- The underside of the merry-go-round cannot be more than 9 inches above the protective surface; and
 - The rotating platform cannot have any sharp edges; and
 - The rotation speed cannot exceed 13 feet per second; and
 - There must be an accessible route. (Note that ADA accessibility requirements are discussed separately).

³ The Playground Inspector must be certified by the National Playground Safety Institute. 22 Cal. Code Regs. § 65750.

⁴ A memorandum from Doug Monn, Interim Public Works Director to James App, City Manager dated April 19, 2005 references a number of civil suits associated with the ADA filed in the City.

board.gov/play/guide/intro.htm.⁵ The merry-go-round constitutes a ground level play component. Therefore it must be made accessible, or an additional merry-go-round that is accessible must be provided. Based on the age and condition of the merry-go-round, extensive modifications would be required to make the structure accessible under the ADA. However, as previously discussed, we do not believe alteration and reinstallation of the merry-go-round as functioning playground equipment (accessible or not) is a viable option.

3. Application of Analysis to Various Options

In light of the foregoing, we offer the following comments on the various options identified for the future of the merry-go-round. The City may, of course, choose not to reinstall the merry-go-round, with or without providing a replacement structure. The City may completely replace the merry-go-round with a new structure that complies, by design and installation, with modern safety standards and the ADA.

If the merry-go-round is taken out of commission as a working playground component, which we recommend, two possible options have been identified for its future. Recreation Inc., a non-profit organization, has offered to auction the structure and use the proceeds to refurbish remaining park equipment in City Park. Alternatively, the merry-go-round can assume its place in history as a nonmoving display at Pioneer Museum or elsewhere.

The City may not reinstall the structure "as is" without violating the law. Moreover, it is unlikely that the City can alter and reinstall the merry-go-round in compliance with applicable safety and accessibility standards. An attempt to do so would subject the City to enormous potential liability. Even if the structure could be adequately modified, the modifications would be costly and would make the merry-go-round virtually unrecognizable in use or appearance. As such, the modifications would not meet the public's interest in preserving the history and character of the merry-go-round.

Conclusion

In sum, we advise against reinstalling the merry-go-round as a playground component for risk management purposes. We recommend that the City consider (a) whether or not it will replace the merry-go-round in City Park, and (b) what it will do with the historic merry-go-round.

⁵ Play components are distinguished by the type of general experience provided by the equipment. Examples of different types of experiences include rocking, swinging, climbing, spinning, and sliding.

Mike Compton,

I've reviewed the memo you previously forwarded, and have the following comments/feedback:

- First I'd like to commend you for your efforts in evaluating the liability risk associated with reinstallation of the non-compliant merry-go-round.
- To satisfy the H&S Code, the merry-go-round must comply with the Consumer Product Safety Commission guidelines, which incorporate the ASTM Specification 1487. If the merry-go-round can be modified to where it complies with the ASTM Specifications, that piece of equipment would be deemed compliant with the H&S Code. Now that the merry-go-round has been removed from the park it is important that it not be reinstalled until it complies with the ASTM Specifications. I believe you indicated to me that while the merry-go-round can be modified to comply with ASTM Specifications it will not resemble the old merry-go-round in the least, and it would cost approximately \$18,000 to modify.
- If the City retrofits/modifies the merry-go-round they move into the products liability arena and it would make it difficult to tender the claim to a third-party manufacturer. When playground equipment needs modification it is always best to defer to the manufacturer to perform the modification, or to approve/recommend modification specifications at a minimum.
- The Authority does not recommend reinstallation of the merry go round, for the above identified reasons.

Please feel free to contact me with any additional questions that you may have.

Regards,

Jim

Jim Gross
Senior Risk Manager
California JPIA
Tel.: (562) 467-8723

HEALTH AND SAFETY CODE
SECTION 115725-115750

115725. On or before January 1, 1992, the state department, in consultation with the office of the State Architect, the California Parks and Recreation Society, the League of California Cities, the Department of Parks and Recreation, the State Department of Education, and the California Council of the American Society of Landscape Architects, shall adopt regulations for the design, installation, inspection, maintenance, and supervision where appropriate, and training of personnel involved in the design, installation, and maintenance, of all playgrounds either operated by public agencies, including a state agency, city, county, city and county, school district, and any other district, or operated by any entity where the playground is open to the public. Those regulations shall meet the standard of care imposed by courts of law on playground operators, and shall, at a minimum, impose guidelines and criteria that shall be at least as protective as the guidelines in the Handbook for Public Playground Safety produced by the United States Consumer Products Safety Commission, shall give due consideration to any successor to the Handbook for Public Playground Safety that may be published, and shall include more protective requirements where the state department finds those guidelines will provide inadequate protection. The regulations shall include special provisions for playgrounds in day care settings, that shall be developed in consultation with the State Department of Social Services and the California Children's Lobby, and that shall be appropriate for children within the range of ages in day care settings. The state department shall not be responsible for enforcement of any regulations pursuant to this section.

115730. (a) All public agencies operating playgrounds, including a state agency, city, county, city and county, and district, shall upgrade their playgrounds by replacement or improvement as necessary to satisfy the regulations adopted pursuant to Section 115725 to the extent state funds are made available specifically for that purpose through state bonds or other means. All other entities operating playgrounds open to the public shall upgrade their playgrounds by replacement or improvement, as necessary to satisfy the regulations adopted pursuant to Section 115725, on or before January 1, 2003.

(b) (1) Subdivision (a) and the regulations adopted pursuant to Section 115725 shall not apply to playgrounds installed between January 1, 1994, and December 31, 1999. Those playgrounds shall be subject to the requirements to upgrade set forth in this subdivision until 15 years after the date those playgrounds were installed, at which time those playgrounds shall be subject to subdivision (a) and the regulations adopted pursuant to Section 115725.

(2) All public agencies operating playgrounds installed between January 1, 1994, and December 31, 1999, shall upgrade those playgrounds by replacement or improvement as necessary to satisfy criteria that are at least as protective as the guidelines in the Handbook for Public Playground Safety, Publication Number 325, United States Consumer Product Safety Commission, November 1994, to the extent that state funds are made available specifically for that purpose through state bonds or other means.

(3) All other entities operating playgrounds open to the public and installed between January 1, 1994, and December 31, 1999, shall upgrade those playgrounds by replacement or improvement as necessary to satisfy criteria that are at least as protective as the guidelines in the Handbook for Public Playground Safety, Publication Number 325, United States Consumer Product Safety Commission, November 1994, on or before January 1, 2003.

(c) Before October 1, 2000, all public agencies operating playgrounds and all other entities operating playgrounds open to the public shall have a playground safety inspector, certified by the National Playground Safety Institute, conduct an initial inspection for the purpose of aiding compliance with the requirements to upgrade set forth in subdivision (a) or (b), as applicable. Any inspection report may serve as a reference when the upgrades are made, but is not intended for any other use.

(d) This section shall not affect the liability or absence of liability of playground operators.

115735. For purposes of this article, all of the following shall apply:

(a) An "entity operating a playground open to the public" shall include, but not be limited to, a church, subdivision, hotel, motel, resort, camp, office, hospital, shopping center, day care setting, and restaurant. An "entity operating a playground open to the public" shall not include a foster family home, certified family home, small family home, group home, or family day care home, which is licensed and regulated to meet child safety requirements enforced by the State Department of Social Services.

(b) "Playground" shall refer to an improved outdoor area designed, equipped, and set aside for children's play that is not intended for use as an athletic playing field or athletic court, and shall include any play equipment, surfacing, fencing, signs, internal pathways, internal landforms, vegetation, and related structures.

(c) "Supervision" shall include all general and specific supervision necessary to protect children from unreasonable risk of harm from site hazards, the acts of other children, or the use of the playground in a way that was not intended by the designer or manager of the playground. The regulations required pursuant to this article shall not expand on the periods or circumstances when supervision shall be provided beyond the periods or circumstances already determined to be within the existing standard of care to which a playground operator is held.

115736. (a) The State Department of Social Services shall convene a working group to develop recommendations for minimum safety requirements for playgrounds at child care centers.

(b) The working group shall include, but not be limited to, child care center operators, including representatives of the Professional Association for Childhood Education, the California Child Care Health Program, the Children's Advocacy Institute, the State Department of Health Services, and certified playground inspectors.

(c) The working group shall use the national guidelines published by the United States Consumer Product Safety Commission and those regulations adopted pursuant to this article as a reference in developing its recommendations. However, the Department of Social Services shall determine minimum safety requirements that are protective of child health on playgrounds at child care centers.

(d) The working group shall submit its playground safety recommendations to the State Department of Social Services by September 1, 2001.

(e) The working group shall submit its recommendations to the Legislature by November 1, 2001.

115740. Regulations adopted pursuant to this article shall include special provisions where appropriate, as determined by the state department, for the needs of the developmentally disabled in state institutions, pursuant to Division 4.1 (commencing with Section 4400)

of, and Division 4.5 (commencing with Section 4500) of, the Welfare and Institutions Code, and in community care facilities, and other public and private institutions that provide residential or day care specifically for the developmentally disabled.

115745. (a) After the effective date of the regulations adopted pursuant to this article, no state funding shall be available for the planning, development, or redevelopment of any playground, unless the playground, after completion of the state-funded project, will conform to the applicable regulations adopted pursuant to this article. However, where state funds have been appropriated to, or allocated for, a playground project prior to the effective date of the regulations but the regulations become effective prior to the completion of the project, that funding shall be maintained, as long as the playground is altered to conform to the regulations to the extent the alterations can be made without adding significantly to the project cost.

(b) After the date by which an entity is required to conform its playground to satisfy regulations adopted pursuant to this article, no state funding shall be available for the operation, maintenance, or supervision of the playground unless the playground conforms to the applicable regulations adopted pursuant to this article.

115750. All new playgrounds open to the public built by a public agency or any other entity more than six months after the effective date of the regulations adopted pursuant to this article shall conform to the requirements of those regulations. Where the playground developer knows of the regulations before undertaking any expenses related to designing or building the playground, this six-month grace period shall not apply.

RESOLUTION NO. 05-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PASO ROBLES
ESTABLISHING OPTIONS ASSOCIATED WITH A MERRY-GO-ROUND
IN THE DOWNTOWN PARK

WHEREAS, the City Council of the City of El Paso de Robles has determined the need to address a approximately seventy (70) year old park merry-go-round to determine its future; and

WHEREAS, the replacement of the merry-go-round at the park could result in significant exposure to the City should a personal injury occur; and

WHEREAS, City Council has been provided with the following options regarding the merry-go-round;

- a. Restore the merry-go-round to its original location and make no improvements to either the equipment of the surrounding play area.
- b. Rehabilitate the merry-go-round to comply as close as possible the requirements of the Health and Safety code, including the modification of the playground area at an approximate cost of \$336,748.00.
- c. Donate the merry-go-round to the Pioneer Museum to be mounted at the historic school house as a static display (render it incapable of turning).
- d. Donate the merry-go-round to REC, Inc. to be auctioned to raise fund to update the park playground equipment.
- e. As part of the Master Plan study, mount the merry-go-round in the park as a static display to include a plaque describing its history and significance.

THEREFORE BE IT RESOLVED by the City Council of the City of El Paso de Robles, that option letter ____, as noted above, shall be implemented as the means to address the issue of the non-compliant merry-go-round.

PASSED AND ADOPTED by the City Council of the City of El Paso de Robles at a regular meeting of said Council held on the 19th day of July 2005 by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

Frank R. Mecham, Mayor

ATTEST:

Sharilyn M. Ryan, Deputy City Clerk